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# In The
# Supreme Court of The United States

RONALD NAPOLEON WOLFE, SR.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit**

**PETITION FOR A WRIT OF CERTIORARI with Appendix (bound separately)**

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## QUESTIONS PRESENTED

### QUESTION 1

WAS THE "PLAIN VIEW" EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT AVAILABLE TO THE PROSECUTION WHEN THE SEIZING OFFICER KNEW HE COULD NOT SEIZE THE PROPERTY AT ISSUE UNDER THE TERMS OF THE SEARCH WARRANT HE WAS EXECUTING, WHEN HE HAD AMPLE TIME TO SEEK A SECOND SEARCH WARRANT WITHOUT PUTTING HIMSELF AND HIS FELLOW OFFICERS IN JEOPARDY, AND WHEN THERE WAS NO RISK THAT THE PROPERTY WOULD BE LOST, DAMAGED OR MOVED WHILE A SECOND SEARCH WARRANT WAS BEING SOUGHT?

### QUESTION 2

DOES THE "PLAIN VIEW" EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT PERMIT A WARRANTLESS SEIZURE OF PROPERTY FROM A CITIZEN'S HOME WHEN THE SEIZING OFFICER DID NOT CONCLUDE FROM HIS IMMEDIATE SENSORY PERCEPTIONS THAT THE PROPERTY WAS CONTRABAND OR EVIDENCE OF ANY CRIME?

## QUESTION 3

DOES AN AFFIDAVIT WHICH FAILS TO CONTAIN ANY FACTUAL ALLEGATIONS THAT ANY OF THE PROPERTY THE EXECUTING OFFICERS WISH TO SEARCH FOR IS NOW IN OR HAS EVER BEEN IN A CITIZEN'S HOME MEET THE FOURTH AMENDMENT'S PROBABLE CAUSE REQUIREMENTS SO AS TO PERMIT A SEARCH OF THAT HOME?

## QUESTION 4

DOES PROBABLE CAUSE TO BELIEVE THAT STOLEN PROPERTY MAY BE PRESENT IN NON-CONTIGUOUS OUTBUILDINGS PERMIT POLICE OFFICERS TO SEARCH A CITIZEN'S HOME FOR THAT PROPERTY OR RECORDS PERTAINING TO THAT PROPERTY, WHEN THE UNDERLYING AFFIDAVIT FAILED TO ALLEGE THAT SUCH PROPERTY OR RECORDS HAVE EVER BEEN OR IS THEN IN THE CITIZEN'S HOME?

## QUESTION 5

DOES A SEARCH WARRANT WHICH AUTHORIZES A SEARCH OF A CITIZEN'S "ENTIRE PREMISES," INCLUDING HIS HOME AND ALL NON-CONTIGUOUS OUTBUILDINGS LOCATED THEREON, MEET THE FOURTH AMENDMENT'S "PARTICULARITY" OF THE PLACE TO BE SEARCHED REQUIREMENT, WHEN THE AFFIDAVIT FAILED TO ALLEGE THAT ANY OF THE PROPERTY TO BE SEARCHED FOR AND SEIZED WAS IN OR HAD EVER BEEN IN THE CITIZEN'S HOME?

## QUESTION 6

DOES A SEARCH WARRANT WHICH DIRECTS THE OFFICERS TO SEIZE 11 GENERICALLY DESCRIBED TYPES OF PROPERTY, EACH OF WHICH, AS DESCRIBED THEREIN, COULD BE LAWFULLY OWNED BY THE OBJECT OF THE SEARCH, MEET THE FOURTH AMENDMENT'S PARTICULARITY OF THE PROPERTY TO BE SEARCHED FOR REQUIREMENTS?

## QUESTION 7

WAS THE EIGHT (8) HOUR SEARCH CONDUCTED AT PETITIONER'S HOME AND PREMISES, DONE IN SUCH AN OVERLY BROAD FASHION TO REQUIRE SUPPRESSION OF THE RELEVANT FRUITS OF THAT SEARCH?

## QUESTION 8

WAS THE SEARCH OF PETITIONER'S GUN VAULT A "PRETEXT" SEARCH, DONE IN ORDER TO OBTAIN INFORMATION/EVIDENCE WHICH THE SEIZING OFFICER KNEW THE SEARCH WARRANT HE WAS EXECUTING DID NOT AUTHORIZE HIM TO SEARCH FOR OR SEIZE?

## QUESTION 9

DID THE EXECUTING OFFICERS' EXTRACTION OF THE COMBINATION TO THE GUN VAULT DOOR FROM PETITIONER BY THREATENING TO BLOW IT OPEN AT A TIME WHEN THE PETITIONER WAS IN CUSTODY AND HAD BEEN REFUSED AN OPPORTUNITY TO CONSULT WITH COUNSEL TAINT THE SEIZURE OF THE FIREARMS FROM THAT VAULT SO AS TO REQUIRE THEIR SUPPRESSION AS EVIDENCE?

## QUESTION 10

SHOULD THE DECISIONS OF THE MICHIGAN COURTS THAT THE SEARCH OF PETITIONER'S HOME VIOLATED HIS FEDERAL CONSTITUTIONAL RIGHTS REQUIRE THE COURT OF APPEALS TO GRANT THOSE DECISIONS THE FULL FAITH AND CREDIT DESCRIBED IN 28 U.S.C §1738?

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## OPINIONS BELOW

The October 11, 2000 Opinion of the Sixth Circuit Court of Appeals is reproduced as App. F. The January 12, 2001 Order denying Petitioner's timely Petition for an *En Banc* Rehearing is reproduced as App. G. The September 1, 1998 and January 13, 1999 Opinions of the District Court are reported at 22 F. Supp. 2d 627 (E.D. Mich. 1998) and 32 F. Supp. 2d 945 (E.D. Mich. 1999) and are reproduced as App. A and App. B, respectively. The June 19, 1998 Opinion and Order of the Livingston County (Michigan) Circuit Court is reproduced as App. C. The September 17, 1999 Opinion of the Michigan Court of Appeals affirming the Circuit Court's decision is reproduced as App. D, and the January 21, 2000 Order of the Michigan Supreme Court is reproduced as App. E.

## JURISDICTION

The Sixth Circuit Court of Appeals, on October 11, 2000, affirmed the September 1, 1998 and January 13, 1999 decisions of the United States District Court for the Eastern District of Michigan. Petitioner filed a timely Petition for Rehearing *En Banc* on November 22, 2000. That Petition was denied on January 12, 2001. This Court has jurisdiction to review this case under 28 U.S.C. §1251(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions which are relevant to this case are the Fourth, Fifth and Sixth Amendments to the

Constitution of the United States. The text of those amendments is set forth below. The federal and state statutes which are relevant to this case are 28 U.S.C. §1738, and Michigan Compiled Laws Annotated (M.C.L.A.) §780.655 and §780.656. The text of those statutes is set forth below:

## AMENDMENT 4

**Unreasonable searches and seizures.**

The right of the people to be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## AMENDMENT 5

**Criminal actions–Provisions concerning–Due process of law and just compensation clauses.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## AMENDMENT 6

**Rights of the accused.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## 28 U.S.C. §1738

**§1738. State and Territorial statutes and judicial proceedings; full faith and credit**

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and

credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

**M.C.L.A. §780.655**

**§780.655. Tabulation of property seized; filing; safe keeping of property; restoration to owner; disposition of other property**

Sec. 5. When an officer in the execution of a search warrant finds any property or seizes any of the other things for which a search warrant is allowed by this act, the officer, in the presence of the person from whose possession or premises the property or thing was taken, if present, or in the presence of at least 1 other person, shall make a complete and accurate tabulation of the property and things so seized. The officer taking property or other things under the warrant shall forthwith give to the person from whom or from whose premises the property was taken a copy of the warrant and shall give to the person a copy of the tabulation upon completion, or shall leave a copy of the warrant and tabulation at the place from which the property or thing was taken. He shall file the tabulation promptly with the court or magistrate. The tabulation may be suppressed by order of the court until the final disposition of the case unless otherwise ordered. The property and things so seized shall be safely kept by the officer so long as necessary for the purpose of being produced or used as evidence on any trial. As soon as

practicable after trial, stolen or embezzled property shall be restored to the owner thereof. Other things seized under the warrant shall be disposed of under direction of the court or magistrate, except that moneys and other useful property shall be turned over to the state, county or municipality, the officers of which seized the property under the warrant. Such moneys shall be credited to the general fund of the state, county or municipality.

**M.C.L.A. §780.656**

**§780.656. Breaking of doors and windows**

Sec. 6. The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant.

## Statement of the Case

**(A) The basis for federal jurisdiction in the Courts below.**

This case involves a criminal charge against a federally licensed firearms dealer that he possessed an unregistered firearm in violation of 26 U.S.C. §5861(d). The District Judge denied Petitioner's motion and supplemental motion to suppress the relevant fruits of a December 23, 1996 search of his home by Michigan police authorities. Petitioner thereafter plead guilty to illegally possessing a firearm (silencer) pursuant to a Rule 11(a)(2) plea agreement, and the United States Court of Appeals accepted subject matter and appellate jurisdiction pursuant to 28 U.S.C. §1291.

**(B) Why this case should be reviewed.**

The decisions of the lower courts with respect to the "plain view" questions (1 and 2 above), are in direct conflict with decisions previously reached by this Court, by prior panels of the Sixth Circuit, and by several other Circuit Courts of Appeal.

The decisions of the lower courts upon the federal issue of whether the affidavit at issue met the "probable cause" requirements of the Fourth Amendment are in direct conflict with the decision of the Michigan court of last resort in this very case (Questions 3 and 10 above).

The decisions of the lower courts are also in conflict with decisions of this Court and other Courts of Appeals upon the questions related to the Fourth Amendment's "probable

cause" and "particularity" requirements (Questions 3, 5 and 6 above).

The facts of this case will allow this Court to decide important federal constitutional issues which Petitioner believes should be settled by this Court. Those issues are described in Questions 4, 7, 8 and 9 above.

**(C) <u>The facts of this case.</u>**

Petitioner became a Class III federally licensed firearms dealer in the early 1970s. He was employed as a police officer in Highland Park and Unadilla Township, Michigan from 1984 to 1990. Over the years, Mr. Wolfe sold Class III firearms to several police jurisdictions. Some of those firearms were test-fired upon the 50+ acre tract which was the object of the December 23, 1996 search at issue herein.

On December 6, 1996, Livingston County Detective Allan Perry began the investigation which culminated in the search at issue. He spoke to Harold Van Patten and William Harp, the men who were represented to be the source of most of the facts which were attributed to anyone in the affidavit at issue (App. J). Shortly before December 19, 1996, Perry took the results of his investigation to Dan Garber, a veteran Assistant Prosecutor (App. R, pp. 3-4), to seek the search warrant at issue. That search warrant was approved by Judge Michael Hegarty at 7:15 a.m. on December 23, 1996.

**(1) The sufficiency of the affidavit.**

Counsel respectfully contends that a fair evaluation of what is in and what is **not** in the affidavit, if made without regard to the eventual incriminating fruits of the search itself, will confirm that it contains absolutely no allegations of fact or even unsupported conclusions that any of the 11 types of property, records, photos, etc. the search warrant authorized Detective Perry to search for were **then in or had ever been in** Mr. and Mrs. Wolfe's **home**. The federal prosecutor stipulated to that construction of the affidavit (App. X, pp. 3-8). Detective Perry testified in both the federal and state courts that no one had told him, prior to the search, that any of the 11 types of property was then in or had ever been in Mr. and Mrs. Wolfe's home (App. X, pp. 7-9; App. P, pp. 3-4; App. Q, pp. 4-8, 12-15). When he entered Mr. Wolfe's gun vault, he had no idea whether any of the 11 types of property was located therein (App. P, pp. 11-12).[1] Per the affidavit, Petitioner had admitted to Mr. Van Patten that he had participated in the theft of building materials (App. K, pp. 5-7) and in the theft of roofing materials (App. K, pp.7-9). Both of these alleged admissions are now known to be false (App.

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[1]These facts bear heavily upon the "good faith" claim made by the Government. That issue is not addressed herein, because the Court of Appeals made no findings upon it. The property to be seized was described in the search warrant exactly as it was described in the affidavit.

A, pp. 15-16; App. S, pp. 3-5; App. Q, pp. 3-4; App. X, pp. 9-22). Detective Perry also falsely swore that he had either "personally verified" or "verified" several facts which tended to corroborate hearsay descriptions of events attributed to Mr. Van Patten and Mr. Harp. Judge Burress described each of the affidavit's misrepresentations and material omissions in great detail–with appropriate annotations to the eight (8) volumes of testimony received in the state court hearing (App. C, pp. 19-37). He also addressed and resolved the precise probable cause issue posed to Judge Gadola–whether **the contents of the affidavit** included sufficient facts to allow him to find, per the requirements of *Illinois v. Gates*, 462 U.S. 213, 236-239, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983), that there was a "substantial basis" for concluding that there was "a fair probability" that contraband or evidence of a crime would be found in the particular place (the Wolfe's home) to be searched (App. C, pp. 17-18). Judge Burress held that:

> "The only structures upon the premises in which any evidence of any of the alleged crimes may be found are the new pole barn with a dark brown shingled roof and OSB siding, and a gray airplane hangar structure with a steel roof. A search of any other structure of the premises was not supported by probable cause."
> (App. C, p. 37)

During the state court hearing, Judge Hegarty testified that he had reviewed the six (6) page affidavit for five (5)

minutes after being summoned from his shower at approximately 7:00 a.m. on December 23, 1996 (App. U, pp. 3-5; *see also,* App. K, pp.1-2; App. L). After carefully re-reading the affidavit in Judge Burress' court, he agreed that it contained no allegations that any of the stolen material was then in the Wolfe home, and no allegations that any of the 11 types of property the search warrant directed the officers to search for and seize had ever been seen in the home (App. U, pp. 7-12).

The federal prosecutor attempted to stipulate this testimony (App. Y, pp. 5-7). Judge Gadola refused to accept that stipulation, and appeared to adopt Judge Hegarty's **personal opinion** that some records were more likely to be found in the home rather than the barn (App. U, pp. 9-10) as the equivalent of the affidavit containing allegations that such records were **actually** in the Wolfe's home (App. Y, pp. 8-11). Judge Hegarty re-affirmed his state court testimony that he had rejected affidavits which failed to allege that the property to be searched for was in the place to be searched (App. U, pp. 6-7; App. Y, p. 3-5).

**(2) The plain view facts.**

These are the issues which most clearly cry out for review by this Court. Judge Gadola acknowledged that unless the Government established an exception to the warrant requirement, the firearms "... must be suppressed at defendant's trial" (App. A, p. 33). The only exception to the warrant requirement the Government offered was the "plain

view" doctrine. Mr. Haviland acknowledged that it was the Government's burden to establish the applicability of that doctrine to the facts of this case (App. W, pp. 4-5).[2]

This issue has two (2) parts, i.e.:

**(A) Was there an urgent enough need to seize the firearms to excuse the failure to seek a second search warrant?**

The Government offered absolutely no evidence upon this issue. At the time Perry entered the vault, he was one (1) of five (5) armed police officers who were conducting the search in or near Mr. Wolfe's home. Mr. Wolfe was in jail, miles from his home. Mrs. Wolfe was the only non-police person in her home. She was unarmed, clad only in sweat pants and a bathrobe (App. V, pp. 3-4). An armed police officer was assigned to guard her throughout the search (App. V, pp. 6-8) to prevent her from interfering in any way with the search (App. Q, pp. 15-20). Perry knew, when he saw the marijuana and firearms in the gun vault, that the original search warrant did not authorize him to seize them (App. O, pp. 6-7). He had not expected to find marijuana in the vault.

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[2]Looking ahead for just a moment, this Court has described that burden to be "heavy" when police attempt to establish the existence of an **urgent enough need** to justify warrantless searches or arrests. *Welsh v. Wisconsin*, 466 U.S. 740, 749-750, 80 L.Ed.2d 732, 104 S.Ct. 2091 (1984).

When he saw it, his first instinct was to call Mr. Garber to ask if he (Perry) should obtain a second search warrant (App. O, pp. 7-8). He could have assigned one of the armed detectives who were at the scene to guard the door to the vault to make sure that none of its contents was disturbed while he (Perry) obtained a second search warrant. He knew seeking a second warrant would have allowed a judge to decide whether the presence of marijuana in the vault allowed him (Perry) to also seize any of the guns in the vault (App. O, pp. 8-9). He agreed that when he entered the gun vault, he and the other police officers on the scene were in total control of the premises, and that he had "ample" time to seek a second search warrant without endangering any of the officers, and without creating any risk that the contents of the vault would be lost or destroyed (App. Q, pp. 24-26). He confirmed all of these facts during his federal court testimony (App. X, pp. 47-58). Judge Hegarty and other Livingston County judges were available to consider requests for search warrants during the morning of December 23, 1996 (App. U, pp. 12-13).

Counsel to Petitioner argued that there were no facts to justify a failure to seek a second search warrant when Mr. Perry discovered the contents of the gun vault (App. W, pp. 5-6). That precise contention was squarely and repeatedly made to the Court of Appeals (App. GG, pp. 5-7; App. HH, pp. 3-6; App. II, pp. 2, 6-7). The Government neither objected to that issue being raised in the Court of Appeals, nor did it offer any meaningful response to it. Nevertheless,

the Court of Appeals, in both its original opinion (App. F) and in its denial of Petitioner's request for an *en banc* hearing (App. G), failed to acknowledge, address or resolve this issue.

**(B) Was the criminal nature of the firearms "immediately apparent" to Detective Perry?**

Judge Gadola held that **Perry** himself had probable cause to link the firearms with criminal activity when he first saw them based upon Perry's bald assertion that he had such probable cause (App. A, p. 35), and legal conclusions Perry did not testify he considered or drew when he found the firearms in "plain view" (App. A, pp. 35-38). Judge Gadola also held that Perry's training, experience and the facts and conclusions he testified to concerning his initial reaction to the firearms was irrelevant to the "immediately apparent" element of the plain view exception to the warrant requirement (App. A, pp. 40-41). The Court of Appeals affirmed Judge Gadola's plain view decision by adopting legal conclusions Perry did not draw, **and** by injecting a "reasonable person in Perry's situation" standard in concluding what was "immediately apparent" to Perry when he first saw the firearms in plain view (App. F, pp. 21-22). No case authority was offered to support this "reasonable person in Perry's situation" standard of review. Petitioner contests both of the lower court's "immediately apparent" rulings, particularly the Court of Appeals unilateral use of a

"reasonable person" standard without any citation of legal authority.

Perry had been a police officer since 1977 (App. O, pp. 3-4), and a detective for 10 of those years (App. W, pp. 8-9). He had sworn to over 100 search warrant affidavits (App. W, p. 9). He knew that an affidavit had to allege facts to establish that the property to be searched for was on the premises to be searched (App. X, pp. 22-24), that he was required to limit his search to the property listed in the warrant, and that he was not to search for other contraband he might think was at the place to be searched (App. X, pp. 23-27). Perry knew, on and before December 23, 1996, that Mr. Wolfe was a federally licensed firearms dealer (App. P, p. 10). He knew federally licensed dealers could lawfully possess firearms which non-licensed persons could not lawfully possess (App. X, pp. 38-39). He knew there were different classes of firearms dealers, but he did not know what class license Mr. Wolfe possessed (App. P, pp. 4-6). When he entered Mr. Wolfe's gun vault, he did not know what kinds of weapons different federally licensed dealers could lawfully possess (App. P, pp. 5-6; App. X, pp. 35-37), but he did know that persons with "proper licenses" could lawfully possess firearms such as automatic weapons, pen guns and silencers (App. Q, pp. 28-30).

Prior to December 23, 1996, Perry had been told by Mr. Harp and Mr. Van Patten, that Mr. Wolfe had a "secret" gun vault in the basement of his home (App. O, pp. 4-5).

Harp told Perry that Mr. Wolfe maintained hundreds of firearms in that vault, including illegal automatic weapons and silencers (App. O, pp. 5-6, 104-105; App. X, pp. 30-33). Perry did not investigate those allegations (App. O, pp. 5-6, 12-14; App. X, pp. 31-33), and when he entered upon Mr. Wolfe's property on December 23, 1996, he did not know whether Mr. Harp's allegations were true (App. O, p. 12-13). However, because of Harp's allegations, Perry spoke to federal ATF officer Randy Evans in late December, 1996, when he was about to search Mr. Wolfe's property (App. O, pp. 11-12; App. X, pp. 27-30). Perry asked Evans whether Mr. Wolfe's firearms license allowed him to possess automatic weapons or silencers (App. O, pp. 13-14; App. X, pp. 35-36). Perry made that inquiry of Mr. Evans because of Harp's allegations about such weapons and because **he did not then know** whether Mr. Wolfe could lawfully possess such weapons (App. X, pp. 35-37). Evans declined to answer Perry's question (App. O, pp. 13-14), but he told Perry that if he (Perry) saw "those things", or if Perry saw any "funny" weapons during the search, he (Perry) could call upon Mr. Evans for help (App. O, pp. 13-14; App. P, p. 21). Perry, despite his pre-search knowledge that the December 23, 1996 search warrant did not authorize him to search for or seize any firearms, admitted that he intended to search for firearms at Mr. Wolfe's home, including those he expected to find in the "secret" gun vault, in order to report his findings to Mr. Evans

for whatever action Evans deemed appropriate (App. O, pp. 14-16).

Perry had owned but one (1) firearm prior to December 23, 1996–his service revolver (App. P, pp. 15-16), and he had no expertise with firearms (App. P, pp. 13-14, 15-16., 19-20). When Perry entered the gun vault and saw the firearms therein, he admitted he could **not tell**, simply by looking at the firearms, whether they were illegally possessed by Mr. Wolfe! He made that admission in both the state and federal hearings (App. P, pp. 5-6; App. X, pp. 40-42). He called upon Mr. Evans, days after the search, to determine the legality of the weapons seized from the gun vault (App. X, pp. 41-43). The only guns he could tell were "loaded" when he made his initial observations inside the gun vault were revolver pistols, and he did not (then or ever) conclude that any of those pistols were illegally possessed or even suspicious (App. X, pp. 60-61). He could not tell, without handling and turning over the guns, pen guns and/or silencers[3] he saw in the gun vault, whether they failed to have serial numbers upon them (App. X, pp. 58-61).

Although Perry did not know what sort of registration books, documents, or other paperwork a federally licensed gun dealer was obligated to maintain with or near his firearms

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[3]The count to which Petitioner plead guilty charged him with possessing an unregistered silencer which bore no serial numbers (App. N, pp. 1-2).

(App. X, pp. 36-38; App. P, pp. 6-9), he initially contended that one of the reasons he seized the firearms from the vault was because he could not find sufficient "paperwork" in Mr. Wolfe's home (App. O, pp. 10-11). When questioned more closely about that contention he conceded that federal registration considerations were not a factor in his having seized firearms from Mr. Wolfe's vault, and that his "search" for "paperwork" occurred **after** the firearms were being "collected" (App. P, pp. 6-9).

Perry knew on December 23, 1996, that before possession of an otherwise innocent firearm could be rendered illegal because of it being "in with" or near "dope," the firearms had to in some fashion, "facilitate" or protect the illegal dope. He admitted that he "... couldn't make that determination ..." (App. Q, pp. 26-27). He told Judge Burress that when he discovered the marijuana in the gun vault, his first reaction (other than his consideration of the need for a second warrant) was that he recognized he had "a problem," and that pursuant to his customary practice, he called the prosecutor (Garber) for legal advice (App. P, pp. 11-14). He also specifically admitted that he did not associate any firearm he saw in the vault with the marijuana he found in the gun vault, and that this legal problem was why he called Mr. Garber "... in the first place," i.e.:

> Q. Well, don't–let me try it again. Did you associate any–any firearm that was seized from the house directly to

be related to the marijuana growth operation?

A. Well, I felt in my mind that that was a legal question. That's why I called Garber in the first place. It wasn't for me to determine whether or not these guns were connected to the dope. That may require an entirely different and lengthy investigation.

Q. Right.

A. So.

Q. So the answer to my question is you didn't one way or the other associate–

A. No.

Q. –any weapon with the marijuana growing in the materials.

A. Not any particular weapon, no. **There weren't any weapons in with the marijuana**, if that's what–"

(App. P, pp. 21-22; App. X, pp. 50-55) (emphasis added)

Perry did **not** testify that he concluded or that he was told by Mr. Garber that he could seize any of the firearms in Mr. Wolfe's vault because the "proximity" of the firearms to the marijuana violated Michigan's felony firearms statute.[4]

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[4]It did not, as of 1996, unless the firearm was accessible to or at the defendant's disposal. The weapons in the vault clearly were not accessible to or at Mr. Wolfe's disposal when Perry entered the gun vault. *People v. Williams*, 212 Mich. App. 607, 609; 538 N.W.2d 89 (1995),

Mr. Garber did **not** testify that **he told Perry** that he (Perry) could seize firearms from Mr. Wolfe's gun vault **because** they represented a violation of Michigan's felony firearms statute.

Perry eventually admitted that the "sole" reason he seized firearms from the gun vault was because Mr. Garber told him to do so, i.e.:

> Q. Right, you go in, you got a search warrant, you find something, you back out, go back to the judge, incorporate the first search warrant, tell him what you found, go back in.
>
> A. Yes, I'm familiar with that.
>
> Q. Why didn't you do that in this case?
>
> A. **Well, after speaking with the Prosecutor I was advised that I had enough to seize the growing operation.**
>
> Q. **So, you relied solely on his determination.**
>
> A. **Well, yes, that's what we do.**

(App. Q, p. 25) (emphasis added)

Perry had no information that the only weapon described in the affidavit as having been "used" by Mr. Wolfe to commit the crimes described therein (App. K, pp. 5-7) was in the gun vault when he entered it (App. O, pp. 15-20). Although some of the firearms he saw in the vault raised

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*app. denied*, 451 Mich. 860; 546 N.W.2d 262 (1996).

"questions" or "suspicions" in his mind, it was not until he called Mr. Garber that he decided to "... seize the weapons **for inspection**" (App. X, pp. 39-47). Those "questions" and/or "suspicions" and Perry's lack of firearms expertise were what caused him to ask Mr. Evans, on December 26, 1996, to inspect some of the firearms seized from Mr. Wolfe's home (App. P, pp. 15-20; App. X, pp. 41-43). Perry turned over several of the weapons he had seized from Mr. Wolfe's gun vault to ATF Agent Evans on February 3, 1997 (App. M, App. Q, pp. 20-24). Mr. Evans' subsequent investigation resulted in the December, 1997 federal indictment of Mr. Wolfe.

**(3) The general search issue.**

The federal prosecutor stipulated that the entire record made before Judge Burress could be considered by Judge Gadola (App. W, pp. 3-4). Petitioner's March 10, 1998 federal motion to suppress and supporting brief alleged that the search, as conducted at his home, was "... grossly overbroad" (App. Z, p. 3; App. AA, pp. 2-3, 9-10). When counsel to Petitioner sought to question Detective Perry about the overly broad nature of the search (App. X, pp. 61-67). Judge Gadola sustained the prosecutor's objection as follows:

> "... the search may very well – certainly may be that the search was unauthorized and went too far regarding some items, but not other items. But I'm really concerned with the – with the search which discovered these

firearms and resulted in the seizure of the firearms."
(App. X, p. 66-67)

He made **no** findings upon the general search question in his September 1, 1998 Opinion. When Petitioner asked Judge Gadola to allow general search proofs to be offered and to make appropriate findings upon that issue (App. BB, pp. 9-12), the Government contended Petitioner had not offered sufficient facts upon that issue to justify the court's consideration of it (App. CC, pp. 3-5). Petitioner responded by submitting a detailed summary of the general search evidence contained within the state transcripts, and a supporting brief (App. DD, pp. 5-7, 8-58 of brief).[5] Judge Gadola refused to consider that summary (App. EE). When counsel again asked Judge Gadola to make findings of fact and conclusions of law upon the general search (and particularity) issues in January, 1999 (App. FF, pp. 3-26), Judge Gadola refused (App. B, pp. 5-9). The Court of Appeals refused Petitioner's request to remand this case back to Judge Gadola to make findings upon the general search and/or the particularity issues (App. II, p. 8).

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[5]Page limitations upon this Petition preclude even an abbreviated sampling of that submission.

**(4) The particularity issues.**

In March, 1998, Petitioner raised these issues in conjunction with the general search issue (App. Z, p. 3). Judge Gadola failed to make any findings upon either issue in his September 1, 1998 Opinion, and when counsel to Petitioner asked him to make such findings (App. BB, pp. 2-8), he refused to do so. The Court of Appeals held that Petitioner had not articulated in what way the warrant failed to particularly describe the items to be searched for and seized (App. F, pp. 14-16), despite specific factual arguments to that end in Petitioner's original brief (App. GG, pp. 3-6, his reply brief; App. HH, p. 3) and in his request for an *en banc* hearing (App. II, pp. 4-6).

**(5) The pre-text search.**

The facts pertaining to this issue are set forth in the plain view section above, and in App. DD, pp. 21-28). Basically, it is Petitioner's contention that Perry used the original search warrant as a pre-text for investigating Mr. Harp's unsubstantiated allegation that Mr. Wolfe maintained illegal firearms in his gun vault at a time when Perry knew the search warrant he was executing did not permit such a search.

**(6) The Fifth and Sixth Amendment violation.**

Perry offered no explanation for breaking the lock which secured the bookshelves in front of the gun vault door (App. X, pp. 27-29) (as required by M.C.L.A. §780.656) other than the affidavit and search warrant (App. Q, pp. 16-17). Petitioner was in jail when Perry called to demand the

combination to the (Wolfe's) gun vault. He knew his gun vault contained marijuana (App. T, p. 4). His request to confer with counsel had been denied (App. T, p. 3). He provided incriminating evidence because he feared for the safety of his wife and the officers (App. AA [Aff.], pp. 11-14). Perry immediately exploited that incriminating evidence by opening the door to the gun vault. The Government conceded that Perry's actions constituted a "*Miranda*" violation (App. FF, p. 10-11).

**(7) The full faith and credit issue.**

Petitioner's challenge to the sufficiency of the factual allegations in the affidavit to support a search of his home was upheld by the Michigan Courts (App. C, D and E). An identical claim has thus far been rejected by the Federal Courts (App. A and F).

## Argument

### I. The Plain View Issues (Questions 1 and 2)

**(A) The need to seek a second search warrant.**

Few constitutional principles are more firmly rooted in our national conscience than the romantic vision of a humble peasant withholding access to his drafty cottage **UNTIL AND UNLESS** the police obtain an arrest or search warrant from a "neutral and detached" judicial officer. *Miller v. United States*, 357 U.S. 301, 307, 2 L.Ed.2d 1332, 78 S.Ct. 1190 (1958) and *Johnson v. United States*, 333 U.S. 10, 13-14, 92 L.Ed. 436, 68 S.Ct. 367 (1948). All warrantless searches of homes are *per se* unreasonable–subject to only a

few well delineated and carefully drawn exceptions. *McDonald v. United States*, 335 U.S. 451, 456, 93 L.Ed. 153, 69 S.Ct. 191 (1948) and *Mincey v. Arizona*, 437 U.S. 385, 390, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978). These exceptions are based upon two (2) "practical" considerations, i.e., (1) that the officer would be placed in danger if he had to seek a warrant, or (2) that the evidence could be moved, lost, hidden or destroyed unless seized immediately.[6] If neither of these justifications is established, the search is *per se* illegal, no matter how obvious it was to the seizing officer that what he found in a citizen's home was evidence of a crime.[7]

Detective Perry freely admitted to facts which negate both practical justifications for his failure to seek a second

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[6]*Coolidge v. New Hampshire*, 403 U.S. 443, 467-468, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971); *Chimel v. California*, 395 U.S. 752, 762-763, 23 L.Ed.2d 685, 89 S.Ct. 2034 (1968); *Texas v. Brown*, 460 U.S. 730, 739, 75 L.Ed.2d 502, 103 S.Ct. 1535 (1983); *Arizona v. Hicks*, 480 U.S. 321, 327, 94 L.Ed.2d 347, 107 S.Ct. 1149 (1987); *Arkansas v. Sanders*, 442 U.S. 753, 762, 61 L.Ed.2d 235, 99 S.Ct. 2586 (1979); and *Mincey v. Arizona, supra.*, pp. 393-394.

[7]*Agnello v. United States*, 269 U.S. 20, 33, 70 L.Ed. 145, 46 S.Ct. 4 (1925); *Carroll v. United States*, 267 U.S. 132, 153, 69 L.Ed. 543, 45 S.Ct. 280 (1925); *McDonald v. United States, supra.*, pp. 454-456; *Johnson v. United States, supra.*, pp. 13-15; and *Chapman v. United States*, 365 U.S. 610, 613-616, 5 L.Ed.2d 828, 81 S.Ct. 776 (1961).

search warrant. This Court has the authority to consider this aspect of the plain view issue. *Illinois v. Gates*, *supra.*, pp. 219-220.

**(B) The "immediately apparent" element of the plain view doctrine.**

This Court has consistently resolved the "immediately apparent" element of a plain view seizure by analyzing what facts were available **to the seizing officer at the time he/she made his/her initial observation of the evidence, together with the impact of the seizing officer's training and experience upon his/her conclusion that what was before him/her was evidence of a crime.**[8] It has never adopted a "reasonable person" in the seizing officer's situation standard. In *Arizona v. Hicks*, this court squarely held that an officer could **not**, pursuant to the plain view doctrine, move an object to acquire its serial number because he **suspected** it might be stolen, even when he contemporaneously confirmed his suspicions with a telephone call to his headquarters. To permit a plain view seizure based upon suspicion alone was said to allow warrantless seizures to occur based upon:

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[8]*Coolidge v. New Hampshire, supra.*, pp. 466, 468; *Texas v. Brown, supra.*, pp. 742-743; *Arizona v. Hicks, supra.*, pp. 326-327; *Horton v. California*, 496 U.S. 128, 142, 110 L.Ed.2d 112, 110 S.Ct. 2301 (1990); and *Minnesota v. Dickerson*, 508 U.S. 366, 379, 124 L.Ed.2d 334, 113 S.Ct. 2130 (1993).

> "lesser grounds *** than would have been needed to obtain a warrant for the same object if it had been known to be on the premises."
> *Id.*, p. 327

Before this case, the Sixth Circuit had repeatedly followed this Court's construction of the "immediately apparent" element of the plain view doctrine. Two (2) cases, *United States v. Gray*, 484 F.2d 352, 355 (6th Cir., 1973) and *United States v Szymkowiak*, 727 F.2d 95, 98 (6th Cir., 1984), involved situations where, like here, officers found firearms their search warrant did not cover. In both cases, the executing police officers were suspicious enough about the firearms to either copy serial numbers and run a check upon them after leaving the scene (*Gray*), or to call an ATF agent to the scene, and seize the firearm based upon that agent's advice (*Szymkowiak*). In both cases, the Sixth Circuit expressly held that because the facts available to the **executing officers**, at the time **they** discovered the firearms, did not allow **them** to conclude that the firearms were evidence of a crime, the seizure could not be upheld under the immediately apparent element of the plain view doctrine.

In *Szymkowiak*, the Sixth Circuit said:

> "To prevent any such abuses of the warrant requirement, we must also ensure that probable cause be '**apparent' to the executing officers at the time of discovery. In considering whether probable cause was 'apparent' to the executing officers, a**

**reviewing court should be duly mindful of the executing officers' particular, subjective training and experiences**." *Id.*, p. 98 (emphasis added)[9]

No federal appellate court has held that the "immediately apparent" element of the plain view doctrine can be established by a combination of the seizing officers "suspicions" or "questions," together with after-the-fact legal conclusions **by others** about existing criminal statutes or appellate decisions.[10] Nor has any court ever adopted a "reasonable person" standard in this context. To allow the decision below to stand would be to "water down"[11] the Fourth Amendment's protection by allowing warrantless

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[9]*See also*, *United States v. McLernon*, 746 F.2d 1098, 1124-1125 (6th Cir., 1984), *United States v. Beal*, 810 F.2d 574, 577 (6th Cir., 1987), and *United States v. Calloway*, 116 F.3d 1129, 1133 (6th Cir., 1997), each of which held that the "immediately apparent" element of a valid plain view seizure turns upon the **seizing officers immediate or instantaneous sensory perceptions at the time he/she discovers the evidence in plain view.**

[10]*United States v. Dart*, 747 F.2d 263, 269-271 (4th Cir., 1984); *United States v. Buchanan*, 70 F.3d 818, 825-827 (5th Cir., 1995); and *United States v. Carey*, 172 F.3d 1268, 1272-1275 (10th Cir., 1999).

[11]*Terry v. Ohio*, 392 U.S. 1, 39, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968) (Douglas, J., dissenting).

seizures whenever a police officer can, for whatever reason, gain access to a citizens home and seize whatever does not "look right" to him/her–secure in the knowledge that if the accused has the temerity or stamina to fight, others will subsequently justify his/her suspicions with data he/she did not consider and which was therefore not "immediately apparent" to him/her.

## II. The Probable Cause Issues (Questions 3 and 4)

Judge Hegarty had two (2) options at 7:15 a.m. on December 23, 1996, i.e., to deny Perry access to the Wolfe's premises because the affidavit did not meet the Fourth Amendment's probable cause/particularity requirements, or to allow a search which was limited to those particular areas the facts in the affidavit allowed him to conclude there was a fair probability that particularly described evidence of a crime would be located. *Coolidge v. New Hampshire, supra.*, p. 467. His decision was limited to a "common sense" evaluation **of the facts set forth in the affidavit**. He **could not** substitute his personal life experiences for what the affidavit failed to allege within its "four corners."[12]

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[12]*Aguilar v. Texas*, 378 U.S. 108, 109 fn 1, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964); *Whitely v. Warden*, 401 U.S. 560, 565 fn 8, 28 L.Ed.2d 306, 91 S.Ct. 1031 (1971) and *Ornelas v. United States*, 517 U.S. 690, 696-700, 134 L.Ed.2d 911, 116 S.Ct. 1657 (1996).

He did neither. He read the six (6) page affidavit in five (5) minutes, asked no questions, and signed off upon a search which allowed Perry to search every container in every building and vehicle anywhere on Mr. Wolfe's premises. Judge Hegarty told Judge Burress and Judge Gadola the affidavit contained no allegations that any of the property he authorized Perry to search for and seize was in or had ever been in the Wolfe's home. He said he had previously rejected affidavits with that deficiency. The federal prosecutor stipulated to that deficiency. Despite these **undisputed** facts, the lower courts held that the affidavit contained sufficient facts to permit Perry to search Mr. Wolfe's home.

The affidavit in this case, as regards Mr. Wolfe's home, did not rise to the level of the totally conclusionary affidavit which this Court struck down in *Nathanson v. United States*, 290 U.S. 41, 47, 78 L.Ed. 159, 54 S.Ct. 11 (1933) and *Aguilar v. Texas*, 378 U.S. 108, 113-114, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964). *See also, Illinois v. Gates, supra.*, p. 239.

The scope of a search is limited to what is being searched for and to the places in which there is probable cause to believe that property may be found, i.e.:

> "Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a

> suitcase. Probable cause to believe a container placed in a trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." *United States v. Ross*, 456 U.S. 798, 824, 72 L.Ed.2d 572, 102 S.Ct. 2157 (1982).

The implications of permitting police officers to search one's "entire premises" including his home, when the only place an affidavit alleges that any evidence of a crime is located is a specific non-contiguous outbuilding are both obvious and frightening, particularly when tied to the expanded construction of the plain view doctrine adopted below. This Court's *Illinois v. Gates* directive that reviewing courts are to conscientiously assess whether Judge Hegarty had a substantial basis for concluding that the instant affidavit provided "probable cause" to believe that there was a fair probability that contraband or evidence of a crime will be found in "... in a particular place," *supra.*, pp. 238-239, must surely include Petitioner's home as such a particular place.

## III. The Particularity and General Search Issues (Questions 5 through 8)

The very first place Perry searched, after Petitioner's arrest, was the gun vault. That entry was a classic example of an officer entering a location under the purported authority of searching for evidence of one crime when he was really interested in seizing evidence related to another crime for which he did not have a warrant. Such searches are deemed "pretexual" and their fruits should be suppressed. *Horton v.*

*California, supra.*, p. 147 (Brennan, J., dissenting). *See also, Stanley v. Georgia*, 394 U.S. 557, 572, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969) (Stewart, J., concurring).[13]

Judge Gadola refused to address or resolve any of the particularity or general search issues. The Court of Appeals refused to remand these issues back to Judge Gadola.

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[13]Traffic stop/pre-text search cases should not apply to the pre-text residential search at issue here. *Cf., United States v. Robinson*, 414 U.S. 218, 38 L.Ed.2d 427, 94 S.Ct. 467 (1973) and *Whren v. United States*, 517 U.S. 806, 135 L.Ed.2d 89, 116 S.Ct. 1769 (1996).

The rule of law in these areas is clear:

> "The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one 'particularly describing the place to be searched and the persons or things to be seized.' The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. [FN8] Thus, the scope of a lawful search is 'defined by the object of the search and the places in which there is probable cause to believe that it may be found."[14]

Petitioner respectfully asks this Court to either remand these issues back to the District Court, or to grant the instant Petition so they can be meaningfully addressed and resolved.

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[14] *Maryland v. Garrison*, 480 U.S. 79, 84-85, 94 L.Ed.2d 72, 107 S.Ct. 1013 (1987) and cases cited at footnote 8 therein.

## IV. The Fifth and Sixth Amendment Issues (Question 9)

Does a coerced extraction of incriminating evidence from one in custody whose requests to speak to counsel have been denied, require the suppression of the fruits of that admitted violation of Mr. Wolfe's "*Miranda*"[15] rights, when that violation was followed immediately by the acquisition of incriminating evidence? The Government's position is that Detective Perry was entitled to violate Mr. Wolfe's Fifth and Sixth Amendment rights because he was executing a valid search warrant when he demanded the combination to Mr. Wolfe's gun vault. That contention, of course, fails to acknowledge that Perry had not been told by anyone that the gun vault contained any of the property the search warrant authorized him to search for and seize, the evidence that he entered the gun vault to search for evidence he knew the search warrant did **not** authorize him to search for and seize, and the evidence that his pre-search training allowed him to know he was not supposed to do that very thing! Judge Gadola refused to resolve this issue, and it was one of the casualties of the Court of Appeals' page limitations. Petitioner respectfully asks that this Court consider this issue.

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[15] *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966).

## V. Full Faith and Credit Issue (Question 10)

In Michigan, the doctrine of collateral estoppel precludes relitigation of issues in subsequent actions between the same parties or their privies when the original action resulted in a valid final judgment, and the issue in question was actually and necessarily determined in that prior proceeding. *People v. Gates*, 434 Mich. 146, 154; 452 N.W.2d 627 (1990) and *Dearborn Heights School District No. 7 v. Wayne County MEA/NEA, et al*, 233 Mich. App. 120, 124; 592 N.W.2d 408 (1998).

Petitioner understands that there are important issues posed by the absence of the federal agent at the search,[16] as well as the absence of the federal prosecutor at the state court hearing. However, because there is no question that Judge Burress conscientiously applied federal constitutional standards in his decision, Petitioner respectfully asks this Court to either consider this issue in full, or to remand it back to the District Court to develop the record.

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[16]Although ATF Agent Evans was not present at the search, his surrogate was, and he (Perry) fully intended to serve up potentially incriminating evidence to the federal government. The State brought but two (2) of the six (6) "crimes" described in the affidavit to trial, and did not convict Petitioner in either case. It has dismissed all pending cases against Petitioner and returned nearly all of the property seized on December 23, 1996.

## Conclusion and Relief Requested

Justice Marshall, in his *United States v. Ross* dissent, expressed fear that this Court was considering a "probable cause" exception to the warrant requirement (p. 828). This case, as it presently stands, has bypassed that fear by accepting Detective Perry's "questions" and "suspicions" as a sufficient basis for a warrantless "plain view" seizure. Petitioner will sacrifice 41 months of his life if the lower court's suspicion based "reasonable person" construction of the plain view doctrine is allowed to stand. Petitioner therefore respectfully asks this Court to grant this Petition.

Respectfully submitted:

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Dated: **May 4, 2001**

Supreme Court, U.S.
FILED

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No. _____

# In The
# Supreme Court of The United States

RONALD NAPOLEON WOLFE, SR.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit**

**APPENDIX**
**PETITION FOR A WRIT OF CERTIORARI**

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**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**UNITED STATES OF AMERICA,**
***Plaintiff,***

Eastern Dist.
of Michigan
Filed 9/1/98

**CASE NO. 97-50065**

**vs.** **HONORABLE PAUL V. GADOLA**
**U.S. DISTRICT JUDGE**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

## MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS FRUITS OF A STATE SEARCH WARRANT

Defendant has filed a motion to suppress the fruits of a state search warrant. Evidentiary hearings were held on the instant motion on July 30, July 31, and August 24, 1998. For the reasons set forth below, defendant's motion to suppress fruits of a state search warrant will be denied.

## FACTUAL BACKGROUND

The search warrant at issue in the case at bar was based on a six-page affidavit prepared on December 19, 1996 by Daniel Garber, Chief Assistant Prosecutor for

Livingston County. It was signed on December 23, 1996 by Detective Allan Perry, who was during the relevant time period, a Deputy with the Livingston County Sheriff's Department. Perry was engaged in an investigation of various larceny and fraud crimes in which the defendant and others were suspects.

Judge Michael K. Hegarty of the 53rd District Court for the State of Michigan issued the search warrant. It authorized a search of the defendant's entire premises in Howell, Michigan, including:

> The residence and outbuildings commonly referred to as 5753 Fisher Road; said premises include[] a multi story log construction residence located on the west side of Fisher Road in Section 1 of Howell Township, Livingston County, a gray barn with a brown roof having living quarters in the upper story that is located South of the log constructed residence, a new pole barn with a dark shingled roof and OSB siding located southeast of the log constructed residence and a gray airplane hangar structure with a steel roof located north/northeast of the log constructed residence.

The property to be searched for and seized pursuant to the warrant included the following items:

> [d]ocuments or evidence indicative of the ownership or occupancy of the above premises; insurance records including contracts, claim forms and payment forms; bales of hay; golf carts; records relating to building materials for the structures on the premises; shingle samples; building material samples, photographs; records relating to the

possession, ownership or registration of vehicles, records or evidence relating to horse ownership, sales or veterinary treatment.

On December 23, 1996, officers from the Livingston County Sheriff's Department, Michigan State Police and Brighton State Police went to defendant's premises to assist in the entry of the premises and/or execution of the warrant. After entering the house, defendant was arrested. His wife, Marie Wolfe, was given a copy of the search warrant to review.

During the execution of the warrant, Perry went to the basement of defendant's residence where Perry located a large (approximately 10 feet by 17 feet) locked vault concealed behind a moveable shelf unit. Perry knew about this vault prior to the search. Officers asked defendant's wife for the combination to the vault. Marie Wolfe did not assist the officers, so they called the defendant. Defendant by that time had been arrested and taken from his home to the Livingston County Jail. Defendant provided the officers with the combination to the vault's door, after being denied the opportunity to consult with an attorney over the matter.

In the vault, the officers found and seized a long "plant growing light," a water pump, electric timers, a humidity gauge, 8 plastic pots and 17 marijuana growing plants. Also inside the vault the officers found scores of firearms. After locating receipts for only twelve weapons, the officers seized 86 firearms.

The guns seized on December 23, 1998 were later examined the Federal Bureau of Alcohol, Tobacco, and Firearms (hereinafter "Bureau of ATF" or "ATF") which reported that they included: at least 13 unregistered automatic weapons; one unregistered sawed-off rifle; two unregistered pen guns; three unregistered silencers; and two stolen firearms.

Defendant, who is a Class III federally-licensed firearms dealer, ultimately was charged in federal court with 21 counts of firearms charges, including 18 counts of possession of unregistered firearms in violation of 26 U.S.C. § 5861(d), one count of possession of a short-barreled rifle in violation of 26 U.S.C. § 5861(d), one count of possession of a stolen firearm in violation of 18 U.S.C. § 922(j), and one count of failure to record a firearm transaction in violation of 18 U.S.C. § 922(m).[1]

Presently before this Court is defendant's motion to suppress the fruits of the state search warrant. Specifically, defendant seeks suppression of the firearms upon which the charges in the present indictment are based.

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[1]Defendant was also charged in Livingston County Circuit Court with state crimes pertaining to stolen goods and marijuana.

## ANALYSIS

Defendant raises a host of arguments in support of his motion to suppress the firearms. These include assertion that:

1. The affidavit was not properly sworn to by Detective Perry;
2. The affidavit contained false or misleading assertions of material fact;
3. The affidavit was not sufficient to support a finding of probable cause because it did not provide the magistrate with any basis for evaluating the credibility of the informants and did not allege any facts tending to establish the evidence of wrongdoing in the defendant's home;
4. The good faith exception to the warrant requirement is not applicable here because the magistrate acted as a "rubber-stamp" for the police and because the officers who executed the warrant did not rely in "good faith" on the warrant;
5. The search of the vault and seizure of the firearms were not otherwise valid absent a warrant since defendant did not voluntarily consent to the search of the vault;
6. Seizure of the firearms was improper because the warrant did not provide for seizure of such items and because the plain view exception to the warrant requirement is inapplicable; and
7. M.C.L. § 780.656, "Breaking of doors and windows," was violated.

Each of these arguments will be analyzed and discussed *seriatim.*

## 1. DETECTIVE PERRY PROPERLY SWORE TO THE AFFIDAVIT.

Defendant contends that the search violated the Fourth Amendment since Detective Perry allegedly never swore to the document which provided the basis for Judge Hegarty's issuance of the search warrant. The Fourth Amendment specifically requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." U.S. Const., Amdt. 4 (emphasis added).

This Court finds that defendant has not met his burden of proving that Detective Perry was not duly sworn by Judge Hegarty. The Court is satisfied that Detective Perry attested to the truth of the contents of the "affidavit For Search Warrant" in a telephone call to Judge Hegarty on the morning of December 23, 1996, prior to the time Judge Hegarty issued the search warrant. Telephonic oaths are permissible under Michigan law. *See* M.C.L. § 780.651; People v. Snyder, 181 Mich. App. 768, 772-74 (1989) (interpreting M.C.L. § 780.651 and holding that oath required to be taken by police officer requesting search warrant was not required to occur within presence of issuing judge, but could be given over the telephone).

Perry testified in this Court on July 30, 1998, that, although he does not have any independent recollection of the event, he believes that he called Judge Hegarty during the early morning hours of December 23, 1996. Perry testified that Judge Hegarty's procedure was to instruct Perry to raise his right had and attest to the contents of the "Affidavit for Search Warrant" over the telephone. After taking the oath over the telephone, the affidavit and search warrant would either be faxed or delivered to Judge Hegarty for his signature. In this instance, Perry is convinced that the affidavit was delivered to Judge Hegarty for his signature, since Judge Hegarty's fax machine was broken.

Previously, when examined on this precise issue in state court, Perry testified that he personally swore to the affidavit at Judge Hegarty's residence in Hartland, Michigan on the morning of December 23, 1996. The Court does not find this contrary testimony to be accurate. Perry's current testimony was very credible. This Court is satisfied that Perry made a mistake when he testified earlier in state court that he personally took the affidavit to Judge Hegarty's home on December 23, 1996. Perry admitted that the reason he had earlier testified differently was that he was confusing the affidavit and warrant at issue with another affidavit and search warrant (possibly one for a trailer park on Grand River). The Court finds such an explanation plausible. The event at issue took place over two years ago and it is understandable that Perry's memory was not clear

on this issue. In fact, Judge Hegarty conceded during his testimony on March 18, 1996 that his memory as to what transpired on December 23, 1996 was "hazy" as well, and that he, like Perry, could not recall whether Perry had been in his living room on December 23, 1996 and given the oath in person. Judge Hegarty recalled that Perry was in his living room on one occasion and that all the occasions "kinda blend together." Testimony of Judge Hegarty, March 18, 1996, p. 26.

Mover, Perry's most recent version of the events is corroborated by the testimony of Deputies James Bolling and Michael Hawry. On March 11, 1998, these two deputies testified that they, not Detective Perry, took the affidavit to the home of Judge Hegarty, on Hope Lake in Brighton Township, on the morning of December 23, 1996. Although they offered different versions of why Perry asked to hand-deliver the affidavit to Judge Hegarty as opposed to faxing it, (Deputy Bolling testified that the affidavit and search warrant could not be faxed because they were too long), both verified that it was Perry who requested that the affidavit and search warrant be delivered. Furthermore, the log books confirm that Deputies Bolling and Hawry, and not Perry, delivered the search warrant to Judge Hegarty.

The testimony of Judge Hegarty also convinces this Court that Perry was properly given an oath. Judge Hegarty testified that a telephone call would always be placed to him before an affidavit and search warrant were delivered

to his home. *See* Testimony of Judge Hegarty, March 18, 1998, p. 28. In fact, Judge Hegarty indicated that no police officer in their right mind would come to his residence early in the morning with alerting him, first, by telephone. Thus, Perry must have placed the call before he deputies took the warrant to the Judge's home. Judge Hegarty also testified that he never would have signed the search warrant without first swearing Allan Perry, and thus he must have given Perry an oath during the phone call. *See* Testimony of Judge Hegarty, March 18, 1998, p. 59. Judge Hegarty also testified that it was common practice to give oaths over the phone and that if he initially forgot, he would soon remember and rectify the situation. *See* Testimony of Judge Hegarty, March 18, 1998, p. 25-27.

In summary, this Court finds that an oath was given to Detective Perry by Judge Hegarty over the telephone on December 23, 1996, as permitted under Michigan law and prior to the time Judge Hegarty signed the affidavit and issued the search warrant.

**2. THE AFFIDAVIT SWORN TO BY DETECTIVE PERRY ON DECEMBER 23, 1996 IS NOT INVALID ON THE BASIS OF DEFENDANT'S CLAIM THAT IT CONTAINED FALSE OR MISLEADING ASSERTIONS OF MATERIAL FACT.**

Defendant also argues that the search warrant is invalid because the affidavit in support thereof contained false or misleading assertions of material fact necessary to the finding of probable cause. The Court does not find any merit in this contention.

In Franks v. Delaware, 438 U.S. 154 (1979), the Supreme Court held that a search based on a warrant that contains deliberately or recklessly false allegations is invalid unless the remaining portions of the affidavit provide probable cause. *Id.* at 155-56; *see also* United States v. Charles, 138 F.3d 257 (6th Cir. 1998). The Sixth Circuit has applied the Franks v. Delaware holding to conclude that "a court considering whether to suppress evidence based on an allegation that the underlying affidavit contained false statements must apply a two-part test: (1) whether the defendant has proven by a preponderance of the evidence that the affidavit contains deliberately or recklessly false statements and (2) whether the affidavit, without the false statements, provides the requisite probable cause to sustain the warrant." Charles, 138 F.3d at 263 (emphasis added); *see also* United States v. Skinner, 972 F.2d 171, 175 (7th Cir. 1992).

Defendant maintains that the following assertions in the affidavit were deliberately and recklessly false:

1. Bottom of Page 1: "Affiant along with other officers from the Livingston County Sheriff's Department, the Michigan State Police and the Federal Alcohol and Tobacco

and Firearms Division has been conducting an investigation relating to certain larceny and fraud crimes. . . ."

2. Bottom of Page 2: ". . .[T]he hay was unloaded and subsequently stacked in the airplane hangar structure. . . ."
3. Bottom of Page 2: "[A]ffiant has personally verified that numerous pine trees are in the vicinity on the premises."
4. Top of Page 3: "Van Patten noted that both Ronald Napoleon Wolfe and Ronald Napoleon Wolfe, Jr. were armed with automatic pistols at the time of the theft of the hay."
5. Top of Page 3: "Affiant has personally verified that Wolfe has livestock on the premises to be searched which utilize hay as part of their diet."
6. Middle of Page 3: "Van Patten indicated that Ronald Napoleon Wolfe, Ronald Napoleon Wolfe, Jr., and Richard Herbert Culbert subsequently admitted that those materials had been stolen from the Byron Road construction site."
7. Top of Page 5: "Affiant has verified through serial numbers that the golf cart in Harp's possession was one of the two carts stolen from the Oak Pointe Golf Course on January 7, 1995."
8. Middle of Page 5: "Van Patten was provided a photograph of the pinto horse obtained from Jean Wainscott and Van Patten positively identified that horse as being one of the two in the stable during the time."

Defendant also claims that the following information was deliberately omitted from the affidavit in an effort to persuade the judge to issue the search warrant:

1. There was no allegation that Harp participated in the golf cart theft.
2. The affidavit did not state that Ms. Wainscott, the owner of the alleged stolen horses, had alerted the operator of the Michigan Horse Auction to watch for her stolen horses after she discovered they were missing. The operators never contacted Ms. Wainscott to tell her that the horses were at the Auction.

This Court does not find that defendant has met his burden of showing by a preponderance of the evidence that any of these averments or omissions, even if false, were made deliberately or recklessly or were material to a finding of probable cause. First, defendant contends that the averment that the Bureau of ATF was conducting an investigation relating to larceny and fraud crimes was false because the ATF was not conducting such an investigation. Defendant maintains that only the Livingston County Sheriff's Department and the Michigan State Police were involved in such an investigation. This Court finds no purposeful or reckless falsity in that averment. At the evidentiary hearing, Allan Perry testified that during the investigation of larceny and fraud crimes, he learned that defendant possessed and carried weapons, and Perry made inquires of Agent Evans of the Bureau of ATF regarding

weapons. Also, Daniel Garber testified on February 23, 1998 in Livingston County Circuit Court that the ATF was giving advice to the Livingston County Sheriff's Department with respect to various firearms suspected to have been used in larceny and fraud crimes committed by the defendant and others. *See* Testimony of Daniel Garber, February 23, 1998, p. 83. Therefore, the Bureau of ATF was certainly involved in the investigation of various larceny and fraud crimes and, at least to a limited degree, was "conducting" and investigation relating to larceny and fraud crimes. In retrospect, perhaps the word "conducting" was not the most appropriate word to use in the affidavit. The word "involved" may have been more appropriate. However, there has been no showing that such a word choice was used in an attempt to mislead the judge. To the contrary, the error seems to be at most negligent.

Assuming *arguendo* that the assertions were deliberately or recklessly false, it would not upset a finding of probable cause that defendant committed any of the crimes described therein or that the items to be searched for would be found on the premises. Such a representation was virtually immaterial to the affidavit. The fact of the matter is that other state agencies were investigating the defendant for larceny and fraud crimes, and this was made explicit in the affidavit.

Second, defendant asserts that the statement in the affidavit that "the hay was unloaded and subsequently

stacked in the airplane hangar" was false. Defendant points out that the police report does not state that the hay was stacked in the airplane hangar. The Court finds that the statement in question was not false. Harold Van Patten testified that the hay was stacked a day after it was stolen and that he informed Perry of this. *See* Testimony of Harold Van Patten, March 6, 1998, p. 188.

Defendant also contends that the statements by Perry in the affidavit that he had "personally verified" that numerous pine trees were in the vicinity of the premises, and that he had also "personally verified" that the defendant had livestock on the premises were false. The Court finds no deliberate or reckless disregard for the truth in these averments. Perry testified that while he personally did not visit the premises and observe pine trees and livestock there prior to his signing of the affidavit, he was aware that there were pine trees on the premises because Roger Swackhammer had told him so and he was aware that there was livestock on the premises from interviews with William Harp and Harold Van Patten. Additionally, Perry testified at the evidentiary hearing that pine trees were seen during a "fly over" of the premises in which he participated and prior to the time the search warrant was signed.

Perry, in some sense, had verified that there were pine trees and livestock on the premises, although not personally, but through his conversations with others. Indeed, both Daniel Garber, the drafter of the affidavit, and

Allan Perry, the affiant, testified that "personal verification" could mean the confirmation of a fact through speaking with others. *See* Testimony of Daniel Garber, February 23, 1998, p. 21; Testimony of Allan Perry, February 10, 1998, p. 75. In hindsight, the words "personally verified" should not have been utilized. The important point is that this erroneous word choice was not done in a deliberate or reckless attempt to mislead. This Court finds no deliberate or reckless disregard of the truth in this averment.

Defendant also asserts that the averment regarding defendant's admission to Van Patten about a theft of building materials was deliberately or recklessly false. Defendant points to the March 6, 1998 testimony of Harold Van Patten that he never told Perry that defendant had admitted to him that he stole building materials from the Byron Road construction site. Harold Van Patten testified that only Ronald Wolfe, Jr. and Richard Culbert admitted to that theft. *See* Testimony of Harold Van Patten on March 6, 1998, p. 142. Based on the testimony of Harold Van Patten, the averment regarding defendant's admission to the theft of building materials does appear to be incorrect. However, defendant has not shown that the averment was deliberately or recklessly made. Assuming *arguendo* that such a statement was deliberately or recklessly false, there still remains, when the offending statement is redacted, probable cause to believe that a theft

of building materials occurred and that the building materials were on the defendant's premises.

Defendant also contends that another materially and deliberately false averment is that Perry verified through serial numbers that the golf cart in Harp's possession was one of the two carts stolen from the Oak Pointe Golf Course on January 7, 1995. At the hearing on August 24, 1998, the government conceded that this statement was erroneous. Perry was never able to make that correlation prior to the signing of the affidavit. *See* Testimony of Allan Perry, February 11, 1998, pp. 26-29; Testimony of Detective Robert Swackhammer, March 6, 1998, p. 22. Nevertheless, there has been no evidence that this erroneous assertion was made deliberately or with reckless disregard for the truth. The statement has been stipulated as erroneous, and it does not upset a finding of probable cause to believe that defendant participated in a theft of the golf carts.

Other information furnished in the affidavit provides ample basis for the finding of probable cause to believe defendant was involved in the theft of golf cards and that a golf cart would be on his premises. The affidavit provides the following assertions which, in an of themselves, satisfy the probable cause requirement, to wit: That the golf professional at Oak Pointe Golf Course reported a theft of golf carats; that Harp admitted to Perry that he and the defendant were involved in this crime; that

Perry was provided a photograph by Van Patten of a golf cart on the defendant's premises; and that Robert Swackhammer observed the same.

Defendant contends that the affidavit's assertion that Van Patten had positively identified a photograph of a pinto horse, which photograph had been obtained from Jean Wainscott, was not true. Specifically, defendant takes issue with the affidavit's allegation that the source of the photograph was Ms. Wainscott. Defendant contends that the affidavit "filled in the blank" of the photo, and that the source was unknown. The Court finds this argument unavailing. The source of the photograph is immaterial. What is material to the probable cause determination is that Van Patten was shown a photo of the stolen horses and positively identified the animals as being on defendant's property.

Defendant argues that he affidavit does not mention the fact that William Harp not only "observed" the theft of two golf carts by defendant and others, but also participated in the theft. In that regard, so the defendant asserts, the affidavit is false. The Court does not find the affidavit false for that reason. The affidavit clearly conveyed the fact that Harp participated in the theft. A finding that the affidavit is faulty based on its failure to use the word "participating" would amount to exactly the type of hypertechnical review which was been condemned by the Supreme Court. *See* Illinois v. Gates, 462 U.S. 213, 235-

36, (1983); United States v. Ventresca, 380 U.S. 102, 109 (1965) (holding that "affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting . . . [W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common-sense, manner").

Defendant also complains that the affidavit contained another material omission, to wit: that the owner of the stolen horses, Ms. Wainscott, had alerted the operator of the Michigan Horse Auction to watch for her stolen horses, but no sighting of those horses was made at the auction. Defendant argues that this omission was critical to a finding of probable cause regarding the theft of horses, since the affidavit implied that defendant sold the horses in the Michigan Horse Auction on a Saturday. Defendant has not proffered any evidence showing that such an omission was deliberately or recklessly made in an effort to conceal the truth. Moreover, the Court does not find this omission material.

In summary, the Court does not find that defendant has met his burden of showing, by a preponderance of the evidence, that the affiant purposefully or recklessly inserted materially false statements in the affidavit. Alternatively, if all the statements which defendant asserts are deliberately and materially false are redacted from the affidavit, the Court still finds sufficient probable cause to believe that defendant committed the crimes to which those statements pertain and that evidence of those crimes would likely be found on defendant's premises.

## 3. THERE WAS PROBABLE CAUSE TO SEARCH DEFENDANT'S ENTIRE PREMISE BASED ON THE AFFIDAVIT.

Defendant also claims that the affidavit failed to set forth sufficient probable cause to believe evidence of a crime would be found on his premises and therefore the search of his premises was invalid. This argument is two-fold. First, defendant argues that the affidavit is not sufficient to support a finding of probable cause to search defendant's premises because it fails to provide the magistrate with any basis for evaluating the credibility of the informants, Harold van Patten, Scott van Patten and William Harp. Second, defendant argues that the affidavit is insufficient to support a finding of probable cause to search defendant's residence because the criminal acts

alleged in the affidavit did not take place at defendant's residence and because there are no allegations in the search warrant that any stolen items, records and documents were ever seen in the defendant's residence.[2] These arguments will be addressed *seriatim.*

## STANDARD OF REVIEW

The Fourth Amendment to the United States Constitution states that "no Warrant shall issue, but upon probable cause, supported by Oath or affirmation . . ." U.S. Const., Amdt. 4. Probable cause to search has been defined as a "fair probability" that contraband or other evidence of a crime will be found at the place to be searched. Illinois v. Gates, 462 U.S. 213, 238 (1983). *See also* United States v. Savoca, 761 F.2d 292, 297 (6th Cir. 1985) (holding that the "critical element in a reasonable search . . . is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought") (*citing* Surcher v. Stanford Daily, 436 U.S.

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[2]The issue of whether the affidavit provided Judge Hegarty with probable cause to believe that contraband or evidence of crimes would be found at the defendant's residence is crucial to the analysis of whether the officers had authority to seize the weapons from defendant's gun vault under the plain view doctrine. The issue of plain view will be discussed *infra.*

547, 556 (1978), *cert. denied,* 474 U.S. 852 (1985)); United States v. Lockett, 674 F.2d 843 (11th Cir. 1982) (holding that the evidence was insufficient to support a finding of probable cause to search for dynamite on defendant's property without some showing that dynamite was being stored there).

Probable cause is assessed in light of the "totality of circumstances." Gates, 462 U.S. at 238. "The task of the issuing magistrate is simply to make a practical common-sense decision whether, given all circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* A reviewing court should not examine *de nova* the sufficiency of an affidavit supporting a warrant. *Id.* at 236. Rather, "the traditional standard for review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a 'substantial basis . . . for conclud[ing], that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." United States v. Pelham, 801 F.2d 875, 878 (6th Cir.) (quoting Gates, 462 U.S. at 236), *cert. denied* 479 U.S. 1092 (1987). The reviewing court should pay great deference to a magistrate's probable cause determination and should not set aside magistrate's finding of probable cause unless it is "arbitrary." United States v. Weaver, 99 F.3d 1372, 1377 (6th Cir. 1996); *see*

also Massachusetts v. Upton, 466 U.S. 727, 732-33 (1984); United States v. Pelham, 801 F.2d at 877 (*citing* United States v. Swihart, 554 F.2d 264, 270 (6th Cir. 1977)). In doubtful or marginal cases, the reviewing court should uphold the magistrate's finding. Lockett, 674 F.2d at 845. The rationale for this deference stems from a preference for the search warrant process over warrantless searches. *Id.*

In Illinois v. Gates, 462 U.S. 213, 238 (1983), the Supreme Court rejected the strict, two-pronged probable cause test established in Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969). That test required that a search warrant affidavit based on an informant's tip contain information regarding the "reliability or credibility" of the informant and the "basis in knowledge" of his or her tip. In Gates, the Supreme Court explained that while these elements "'may usefully illuminate the common-sense, practical question of whether there is "probable cause" to believe that contraband or evidence is located in a particular place,' they should not be '[understood as entirely separate and independent requirements to be] rigidly exacted in every case . . .'" United States v. Pelham, 801 F.2d 875, 877 (6th Cir. 1986) (*quoting* Gates, 462 U.S. at 230). Gates established that courts must apply a "totality of the circumstances" approach in determining the existence of probable cause. *See Id.* "Probable cause is a 'practical, nontechnical conception' that deals with 'the factual and practical considerations of

everyday life on which reasonable and prudent men, not legal technicians act.'" *Id.* at 230-231 (*quoting* Brinegar v. United States, 338 U.S. 160 (1949)).

## ANALYSIS

Under the standard articulated in Gates, this Court finds that Judge Hegarty had a sufficient basis for finding probable cause to believe that defendant had been involved in numerous crimes and that the items described in the warrant would be found on defendant's premises. First, this Court finds that Judge Hegarty was given ample information from which to determine that informants William Harp and Harold Van Patten were credible. These informants identified themselves to the authorities which lends some credence to their accounts. In general, information provided by a named informant is inherently less suspect than that provided by an anonymous tip. *See* Pelham, 801 F.2d at 878 (holding that information contained in an affidavit provided a substantial basis for the magistrate to find probable cause, in part because affidavit was based on statements of a names informant).

In addition, the affidavit sets forth the basis of William Harp's and Harold Van Patten's knowledge, describing them as "past associates and acquaintances of the [defendant]" who had "repeatedly" over the past several years been on the searched premises. *See* Affidavit for

Search Warrant, p. 2. The defendants also participated in some thefts with the defendant. Indeed, the informants' admissions to the thefts lends credence to their information. *See* United States v. Golay, 502 F.2d 182, 186 (8th Cir. 1974) (holding that "the credibility and reliability of the informant was adequately established by the disclosure in the affidavit that the informant was an admitted participant in the crime and therefore an eyewitness to most of the acts constituting the crime as described in the affidavit"). Moreover, William Harp and Harold Van Patten provided very detailed information, which tends to substantiate their information. *See* Gates, 462 U.S. at 234 (holding that an "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitled [the informant's tip] to greater weight than might otherwise be the case').

Another factor supporting the credibility of the tips made by William Harp and Harold Van Patten is the fact that those tips were corroborated to some degree by independent police investigation. For instance, the account by Harold Van Patten of the hay theft was corroborated by the investigating deputy who located wagon tracks in the field from which the hay was stolen heading in the direction of defendant's premises. Also, pine trees were confirmed to be on the defendant's premises, which corroborated Van Patten's description of the premises. The description of the construction material thefts provided by Van Patten matched

the dates specified in the Livingston County Sheriff's Department's reports. Additionally, the thefts of the golf carts were corroborated, to some degree, by Sgt. Swackhammer's observation of a golf cart on the Wolfe premises. Finally, William Harp and Scott and Harold Van Patten corroborated one another. William Harp and Harold Van Patten both described a different theft in which they participated with the defendant late in the evening, which suggests a *modus operandi* of the defendant. Both William Harp and Harold Van Patten stated that defendant commonly carried handguns. Moreover, William Harp and Harold Van Patten stated that windows were delivered to the Wolfe premises in a piecemeal fashion by Ronald Napoleon Wolfe.

The instant case stands in marked contrast to United States v. Weaver, 99 F.3d 1372 (6th Cir. 1996). In that case, the Court found that the affidavit supporting the warrant did not provide the request probable cause that a search of the defendant's premises would uncover evidence of wrongdoing. *Id.* at 1379-80. The only claim of possible wrongdoing was the averment that "within three days prior to the affidavit date, the informant was on the suspect premises and while there, he saw some quantity of marijuana 'expressly for the purpose of lawful distribution.'" Weaver, 99 F.3d at 1378. The only independent corroboration conducted by the officers was to verify the suspect's name, address, and description of the

residence. In the instant case, more investigation was conducted by the authorities. The two informants corroborated each other. The informants provided their names, and they implicated themselves in criminal acts.

Defendant argues that the magistrate was not informed of one very important fact which purportedly detracts from the credibility of these two informants, to wit: that they had been given immunity by Prosecutor Garber. The Court does not find this fatal to the probable cause determination. William Harp testified that he first implicated himself in criminal activity on December 6, 2996, when he spoke with Allan Perry. He was not promised immunity, however until December 10, 1996. *See* Testimony of William Harp, March 6, 1998, p. 32. In addition, the immunity in and of itself would not necessarily negate the value of the information furnished by these two individuals.

A closer question is whether Judge Hegarty had sufficient information from which he could assess the reliability of Scott Van Patten. If Judge Hegarty had no basis for finding Scott Van Patten reliable, then there was no substantial basis for finding that an insurance fraud had been committed. The affidavit states that Scott Van Patten, Harold Van Patten's brother, told Perry that defendant had admitted to making an insurance claim and recovering money for "stolen windows." Without Scott Van Patten's statement, all that the affidavit reveals is that windows were

stored at William Harp's house and were removed piecemeal by Ronald Wolfe Jr. and that Van Patten noted that defendant's house, then under construction, had been framed and ready for windows by they were delivered piecemeal by Ronald Wolfe Jr. Under the "totality of the circumstances," this Court finds that Judge Hegarty had probable cause to believe an insurance fraud had been committed. The storage of windows at Harp's residence at a time when the building under construction was ready for their installation and the delivery of those windows in a piecemeal fashion to defendant's premises are suspicious circumstances. Thus, Scott Van Patten's statement appears credible. Additionally, it is implied in the affidavit that Scott Van Patten spoke with defendant. As Scott Van Patten is identified as a brother to Harold Van Patten, and since Harold Van Patten is a close acquaintance to defendant, it is very plausible that Scott Van Patten is also acquainted with defendant.

Defendant also contends that the magistrate did not have a substantial basis to believe that evidence of the crimes would be in defendant's residence, as opposed to other buildings on his property, since the affidavit sets forth no facts that the stolen goods or document in question had been seen in the residence. The Court is not persuaded. First, this argument rests on the faulty proposition that before there can be probable cause to search a place, one must directly observed the item to be searched for at the

premises. It is well-settled that "the nexus between the objects to be seized and the premises to be searched can be established from the particular circumstances involved and need not rest on direct observation." United States v. Jenkins, 901 F.2d 1075, 1080 (11th Cir. 1990) (emphasis added) (*quoting* United States v. Lockett, 674 F.2d 843, 846 (11th Cir. 1982)).

In light of United States v. Jenkins, this Court finds that the affidavit provided probable cause to search the residence. First, the affidavit established probable cause to believe defendant resided at the premises to be searched and had been involved in numerous crimes, including a theft of building materials and horses. Thus, a search for "records relating to building materials for the structures or premises" and "records relating to horse ownership, sales or veterinary treatment" would certainly be justified. *See, e.g.*, United States v. Hargus, 128 F.3d 1358 (1997) (holding that "receipts and other records" described in the search warrant would be found at defendant's house and that "there need not be direct evidence or personal knowledge" that the items sought are located at the place to be searched); United States v. Reed, 726 F.2d 339 (3rd Cir. 1984) (holding that because there was probable cause to believe crimes were committed and because documents and records of those crimes were most likely to be in the home, and since the records were needed to corroborate crimes, the search of the home was valid); United States v. Whitten, 706 F.2d 1000

(9th Cir. 1983), *cert. denied,* 465 U.S. 1100 (1984) (upholding a search for records of ownership where multiple defendants were suspected of having utilized the premises as a headquarters for large scale drug operations); United States v. Crozier, 777 F. 2d 1376, 1380-81 (9th Cir. 1985) (upholding a search of "any indicia of ownership and control of the premises").

For the reasons discussed above, this Court finds that the affidavit set forth probable cause to believe an insurance fraud had been committed by defendant. Therefore, a search of the defendant's residence for "insurance records, claims forms and payment forms" was justified. The most logical place for those records and forms would be in defendant's residence.

**4. EVEN IF THE AFFIDAVIT DOES NOT ESTABLISH PROBABLE CAUSE, THE GOOD FAITH EXCEPTION TO THE WARRANT REQUIREMENT IS APPLICABLE TO VALIDATE THE SEARCH IN THE CASE AT BAR.**

The government argues that even if the affidavit does not establish probable cause for the search, the good faith exception to the exclusionary rule applies to validate the search of the premises, including the residence. *See* United States v. Leon, 468 U.S. 897, 920-21 (1984), *reh'g*

*denied,* 468 U.S. 1250 (1984). Under the good faith exception, set forth by the Supreme Court in United States v. Leon, exclusion of evidence is improper when the officers acted in objective, good faith reliance on a facially-valid warrant. *See Id.* There are three specific situations, however, where the good faith reliance exception does not apply:

1. If the warrant is based on a knowing or a reckless falsehood contained in the supporting affidavit.
2. If the magistrate was acting as a mere rubber-stamp for he police, or
3. If the information contained in the affidavit did not add up to probable cause and the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

United States v. Savoca, 761 F.2d 292, 296 (6th Cir.), *cert. denied,* 474 U.S. 852 (1985).

In the instant case, this Court finds that the good faith exception applies. The officers executed the warrant, from an objective standpoint, in reasonable reliance on a facially valid warrant. Defendant contends that the exception does not apply since Judge Hegarty was a mere "rubber-stamp" for the police. Defendant points out that Judge Hegarty issued the search warrant after reviewing the affidavit for only five minutes. Judge Hegarty testified in

Livingston County Circuit Court on March 18, 1998 as follows:

> A. At 7:10 I would have signed and dated and time [the affidavit] and would have read it. And after reading it, I woulda then signed the warrant. After I found good cause.
>
> Q. And the 7:15 a.m. on the search warrant would be representative of what, sir?
>
> A. The time after I read the affidavit, found good cause and decided to sign the search warrant.

Testimony of Judge Hegarty, March 18, 1998 at p. 29-30. This Court does not find that Judge Hegarty acted as a so-called "rubber-stamp" for the police for the following reasons. The alleged five-minute review of the warrant does not *per se* invalidate the judge's probable cause determination. It is certainly possible that Judge Hegarty could have reviewed a six-page document in five minutes. Additionally, Judge Hegarty admitted that the five minute time-span was an approximate span of time. He testified that he had read the affidavit in five minutes "give or take." *See* Testimony of Judge Hegarty, march 18, 1998 at p. 30.

Furthermore, the facts presented in the case at bar are not analogous to other situations in which courts have found the "rubber stamp" exception applicable. *See, e.g.,* United States v. Wilhelm, 80 F.3d 116, 121-22 (4th Cir. 1996). In Wilhelm, the Fourth Circuit held that the magistrate had acted as a mere "rubber stamp" for the

police in approving a "bare bones affidavit," one that contained "wholly conclusory statements which lacks the facts and circumstances from which the magistrate can independently determine probable cause." *Id.* at 121 (*quoting* United States v. Laury, 985 F.2d 1293, 1311 n.23 (5th Cir. 1993)). The affidavit at issue in that case provided no meaningful corroboration, and merely described telephone conversations with a "concerned citizen." *Id.* The affidavit in the case at bar certainly cannot be described as "bare bones." There is no evidence that Judge Hegarty "wholly abandoned his judicial role" merely by reading the affidavit quickly. *See* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326-27 (holding that a town justice who had participated in search of an adult bookstore had failed to demonstrate the required neutrality and detachment).

Therefore, this Court concludes that Judge Hegarty was not acting as a mere "rubber stamp" for the police. The Good Faith exception applies, so that even if the warrant were to be found invalid, the police would be justified in their reliance on it.

## 5. WHETHER THE DEFENDANT CONSENTED TO A SEARCH OF THE VAULT IS MOOT.

In his brief in support of his motion to suppress, defendant argues that he did not consent to the search of his vault. This argument, however, is moot because the

government has never alleged, nor does it intend to allege, that the search of the vault was authorized by defendant's consent.

## 6. SEIZURE OF THE FIREARMS IS VALID UNDER THE PLAIN VIEW EXCEPTION TO THE WARRANT REQUIREMENT.

The warrant at issue does not authorize the police to search for and seize firearms. Thus, unless an exception to the warrant requirement applies, the weapons must be suppressed at defendant's trial because their seizure was beyond the scope of the warrant. The government argues that the seizure of these items is valid under the plain view exception to the warrant requirement. That exception applies if the following requirements are met;

1. the firearms were in plain view;
2. the incriminating character of the firearms was immediately apparent, and
3. the firearms were viewed by an officer lawfully located in a place from where the object can be seen nd seized by an officer who has a lawful right of access to the object itself.[3]

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[3]As this Court has already determined, the affidavit gave Judge Hegarty a substantial basis for finding probable cause to believe various items described in the warrant would be at defendant's residence. Thus, the search of the

*See* Horton v. California, 496 U.S. 128, 142 (1990). It is uncontested that the items were in "plain view," and this Court has determined that the firearms were viewed by officers who were lawfully present. Therefore, the crucial issue become whether the "immediately apparent" requirement has been satisfied. The Supreme Court has equated "immediately apparent" with "probable cause." Texas v. Brown, 460 U.S. 730, 741 (1983). It does not mean, as defendant argues, that a police officer "knows" that certain items are contraband or evidence of a crime. *Id.* Rather, it means that the officer must have "probable

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residence was constitutional. More specifically, the search of the gun vault was constitutional since it is conceivable that the items described in the warrant would be located in the gun vault. *See* Testimony of Allan Perry, February 9, 1998, p. 84, wherein Perry states that he was searching for items authorized by the warrant in the gun vault.

Assuming *arguendo* that the warrant was invalid as to the search of the residence, but that the Leon decision's good faith exception is applicable, this Court would still find that the officers were lawfully searching the defendant's residence for purposes of the plain view doctrine. *See* United States v. Legg, 18 F.3d 240, 244 (4th Cir. 1994) (holding that "the rationale of Leon should apply to render an officer lawfully present for purposes of applying the plain view doctrine . . ."); *see also* United States v. Owen, 621 F. Supp. 1498, 1508-1509 (E.D. Mich. 1985) (finding officers lawfully present for purposes of the plain view doctrine if Leon is applicable).

cause to associate the property with criminal activity." *Id.* at 741-42. (*quoting* Payton v. New York, 445 U.S. 573, 587 (1980)). Indeed, the Supreme Court has recognized that "the phrase 'immediately apparent' was very likely an unhappy choice of words, since it can abe taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." *Id.*

In light of the clarification of the "immediately apparent" prong in Texas v. Brown, this Court finds that Perry has probable cause to link the weapons in the gun vault with criminal activity. This conclusion is further supported by a number of factors. First, Perry testified that he had no intention of seizing weapons during the search. It was only after he discovered the weapons in the gun vault that he determined there was probable cause to seize them. The circumstances under which the guns were found gave Perry probable cause to believe they were contraband. *See* Testimony of Allan Perry, February 11, 1998, p. 217.

The government's position is strengthened by its citation of M.C.L. § 750.227 (b), "Possession of firearm at time of commission or attempted commission of felony." The government persuasively argues that the firearms were lawfully seized because defendant, by placing the guns in a hidden vault next to growing marijuana plants, was in violation of M.C.L. § 750.227 (b). That section provides, in pertinent part, that "[a] person who carries or has in his

or her possession a firearm when he or she commits or attempt to commit a felony . . . is guilty of a felony, and shall be imprisoned for 2 years." M.C.L. § 750.227 (b) (1). Since defendant was feloniously growing marijuana and the firearms were "in his possession" during the commission of that offense, the police had independent grounds for lawfully seizing the firearms. *See Id.; see also* United States v. Meyer, 827 F.2d 943 (3d Cir. 1987) (watches found in a crawl space during a search at a jewelry store for stolen items after owner was asked, but could not produce, evidence of ownership, were properly seized under plain view exception). In addition, among the firearms were silencers and sawed-off rifles, the legal possession of which are so rare that the Sixth Circuit has held that there is probable cause justifying their plain view seizure. *See* United States v. Poulos, 895 F.2d 1113, 1122 (6th Cir. 1990) (holding that a properly registered silencer is "intrinsically suspicious" and its incriminating nature "immediately apparent"); United States v. Weinbender, 109 F.3d 1327 (8th Cir 1997) (holding that while executing a search warrant for clothing, officer found home-made silencer, the seizure of which was proper because possession of a silencer is "illegal"); United States v. Wickizer, 633 F.2d 900, 902 (6th Cir. 1980) (holding that short-barreled rifles were "obviously contraband" and properly seized when found in plain view); United States v. Truitt, 521 F.2d 1174 (6th Cir. 1975) (holding that probable cause justifying

seizure of a sawed-off shotgun was "immediately apparent" from the particular nature of the object).

It is also significant that Perry had been informed that defendant used weapons when committing thefts. Elsewhere on the premises were extensive evidence of such thefts, as well as seven police uniform shirts, three police uniform pants, a police jacket and a police badge with defendant's name, furthering a finding of probable cause to believe the weapons in the vault were associated with criminal activity. *See* United States v. Buckley, 4 F.3d 552, 557 (7th Cir. 1993) (holding that officers properly seized weapons in plain view when they knew at the time they executed the warrant that the defendant was a previous felon); United States v. Jefferson, 714 F.2d 689, 695 (7th Cir. 1983) (holding that "circumstances reasonably alerted the officers to the possibility that the items were fruits of another illegal activity"); United States v. Golay, 502 F.2d 182 (8th Cir. 1974) (holding that "the circumstances presented . . . would have 'reasonably alerted the police officers to the fact that [the defendant] may have been involved in some other illegal activity,' the fruits of which were before them"). Given all the circumstances under which the firearms were found, including defendant's violation of M.C.L. § 750.227 (b), this Court finds that the weapons' incriminating nature was "immediately apparent" to the officers.

Defendant attempts to analogize the instant case to United States v. Szymkowiak, 727 F.2d 95 (6th Cir. 1984), where the court found the plain view exception inapplicable because the objects seized were not "immediately apparent." *Id.* at 98-99. In Syzmkowiak, police officers obtained a search warrant authorizing a search of defendant's apartment for jewelry and a television set. *See Id.* at 96. During the search, the officers found an AR-15 weapon near a couch within the apartment. *See Id.* The agents could not tell whether the gun was illegal, so they called a federal ATF agent to the scene. The ATF agent told the executing officers that the weapon did not violate federal law, but that it "probably" violated state law. The officers seized the weapon and further examination of it resulted in a federal charge being filed against the defendant. The Syzmkowiak court found that seizure of the AR-15 could not be justified under the plain view exception and suppressed the same. *See Id.* at 99. The court stated:

> . . . we conclude that the executing officers' probable cause to connect the seized weapon with criminal activity was neither "immediate" or "apparent." The incriminating nature of the evidence seized as at no time "apparent" to the seizing officers or agents. We note initially that no "nexus" whatsoever exists between the seized weapon and the items particularized on the search warrant. *See* United States v. Gray, 484 F.2d 352, 355 (6th Cir. 1973), *cert. denied,* 414 U.S. 1158

(1984).[4] Further, our review of the record indicates that even ATF agent Haverstick did not have probable cause to believe from the *intrinsic* nature of the seized weapon that the evidence was incriminating. Haverstick, a firearms expert, testified that he believed that possession of such a weapon was not a federal offense. He also stated that he could not determine from the exterior of the weapon whether its possession violated Ohio law. The possession of an automatic firearm in Ohio violated O.R.C. § 2923.17. But Agent Haverstick testified that he "could not say at the time" that he examined the weapon whether it was an automatic firearm. (Transcript p. 65). He further testified that he could not determine from his examination of the evidence whether it was specifically adapted for automatic performance. (Transcript pp. 77-80). After Haverstick's expert examination of the seized weapon, he was able to determine that the firearm's possession was not violative of federal law and was

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[4]In United States v. Gray, 484 F.2d 352, (6th Cir. 1973), the Sixth Circuit found unconstitutional the seizure of rifles. In that case, the officers inadvertently discovered rifles while executing a search warrant for alcoholic beverages. The officers copied down the serial numbers, left the defendant's premises, ran the information taken off the rifles through the National Crime Information Center, and then obtained warrant for the search and seizure of the rifles. The Sixth Circuit found the plain view exception inapplicable to seizure of the rifles since the incriminating nature of the rifles was not apparent to the officers when they first discovered them. *See Id.* at 355.

not able to determine that its possession violated Ohio law.

*Id.* at 98-99.

The instant case is distinguishable from Szymkowiak. In Szymkowiak, there was no apparent nexus between the crimes for which the premises was being searched, i.e., theft of jewelry and a television set, and the AR-15. In the case at bar, unlike the situation in Szymkowiak, firearms were reported to have been used during the crimes under investigation. Thus, there was an apparent nexus between the crimes for which the premises was being searched and the weapons discovered. The affidavit states that the officers had been told the defendant (and his son) "were armed with automatic pistols at the time of [one such] theft." Additionally, in Szymkowiak, the ATF agent who was summoned to the scene determined that the weapons were not illegal. Here, when Perry called Prosecutor Garber, he was informed that the weapons should be seized.

Defendant further attempts to argue that the officers conducting the search knew that defendant was a federally licensed firearms dealer and thus the police could not have known at the time of their discovery if the weapons seized were legal or illegal. This reliance on Detective Perry's subjective state of mind to invalidate the plain view exception is misguided in light of case law holding that a police officer's actual state of mind when executing a

search warrant is irrelevant.[5] *See* United States v. Kalter, 5 F.3d 1166 (8th Cir. 1993); United States v. Hatten, 68 F.3d 257 (8th Cir. 1995); United States v. Willis, 37 F.3d 313 (7th Cir. 1994). In United States v. Kalter, the Eight Circuit held that probable cause is determined under an objective standard, and not by reference to the subjective reasons in police officers' minds which motivated defendant's arrest. *See* 5 F.3d at 1168. In Kalter, officers stopped defendant's vehicle because he was driving at night without lights. *See Id.* The officers subsequently observed a handgun laying on the back seat of the automobile and arrested defendant because they believed he had violated a Missouri statute. *See Id.* (*citing* Mo. Rev. Stat. § 571.303.1(1)). In actuality, Kalter had not violated that

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[5]Even if the court were to consider the officers' subjective state of mind, the following factors weigh heavily against a finding that the officers were unjustified in their conclusion that the firearms were illegal. First, defendant's firearm business was 60 miles away in the Detroit area. Second, during the search, the officers found receipts for only twelve guns, and thus had probable cause for believing the remaining guns were illegal. Third, although not revealed in the affidavit, the officers had received several reports of automatic gunfire on the premises. Fourth, the circumstances under which the guns were found led the officers to conclude at the time of their discover that the weapons were connected with criminal activity. *See* M.C.L. § 750.227 (b).

statute because the gun was not concealed. Nevertheless, the court stated:

> How Officers Risk and Winter interpreted the law is not, in any event, dispositive of the question whether they had probable cause to arrest Kalter. We need not determine how these officers concluded that they had probable cause to arrest Kalter. We ask instead whether a prudent person, who knew about the St. Louis ordinance and who observed what these officers saw, could have believed that Kalter had committed or was committing a crime at the time of his arrest. *See, e.g.*, United States v. Slupe, 692 F.2d 1183 (8th Cir. 1982). It is obvious that a reasonable person could have believed Kalter had violated the St. Louis ordinance by transporting a gun, not enclosed in a case or its original packaging, in the back seat of his vehicle. The facts known to Officers Risk and Winter at the time of Kalter's arrest therefore constituted probable cause to arrest him. We therefore affirm the district court's decision not to suppress the gun recovered incident to the arrest.

*Id.* The objective standard is applied consistently in cases where police officers, though mistaken or unsure of the precise law being violated, nonetheless were found to have had sufficient probable cause to effectuate an arrest or to seize evidence in plain view. *See* United States v. Willis, 37 F.3d 313, 316 (7th Cir. 1994) (holding that seizure of gun in plain view was justified because officer could determine that defendant had probably violated federal statute prohibiting guns on school property as soon as

officer identified glint of handgun); *see also* United States v. Hatten, 68 F.3d 257, 261 (8th Cir. 1995) (holding that "'[p]robable cause demands not that an officer be 'sure' or 'certain' but only that the facts available to a reasonably cautious man would warrant a belief 'that certain items may be contraband or stolen property or useful as evidence of a crime'").

Defendant further argues that the plain view exception if invalid because Detective Perry could not have known that the pen guns specifically were illegal upon surface inspection. This argument is flawed for the same reasons as stated above. "Immediately apparent" does not mean the police officer "knows" or "is certain" that the item is evidence of an illegal nature. Rather, it means that the officer must have "probable cause to associate the property with criminal activity." Brown, 460 U.S. at 741-42. Perry had probable cause to believe the pen guns were illegal, given their proximity to other facially suspect items, such as the sawed-off shotguns and silencers. Additionally, as discussed above, a police officer's actual state of mind when executing a search warrant is irrelevant. *See* United States v. Kalter, 5 F.3d 1166 (8th Cir. 1993); United States v. Hatten, 68 F.3d 257 (8th Cir. 1995); United States v. Willis, 37 F.3d 313 (7th Cir. 1994).

In light of the foregoing, this Court finds that the plain view doctrine is applicable in the case at bar, allowing

an exception to the warrant requirement with respect to the items seized in the vault.

## 7. M.C.L. § 780.656 WAS VIOLATED.

Defendant further argues that the officers violated Section 780.656 of Michigan Compiled Laws, "Breaking of doors and windows," when they entered the gun vault. That section provides in full:

> The officer to who a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant.

M.C.L. § 780.656. Defendant attempts to argue that the officers did not give notice of their authority and purpose before opening the gun vault. However, Detective Perry testified that he provided Marie Wolfe with a copy of the search warrant prior to entering the vault. Perry also stated that he went into the vault to look for items described in detail in the search warrant. Thus, this Court finds that the detective did give notice of his authority and purpose for entering the vault prior to his entering therein.

Although no Michigan case specifically addresses "knocking and announcing" at an inner door, there is case law dealing with this issue in the context of 18 U.S.C.

§ 3109, the federal counterpart to M.C.L. § 780.656. The federal statute provides in full:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C. § 3109. Cases interpreting this federal statute are instructive, and shed light on the "inner door" issue presented in the case at bar.

In United States v. Johnson, 573 F. Supp. 998 (D. Kan. 1983), the court held that "[o]nce law enforcement officers lawfully enter a house, they need not comply with the knock and announce statute before entering every other closed door within residence." *Id.* at 1000 (interpreting 18 U.S.C. § 3109); see United States v. Crawford, 657 F.2d 1041 (9th Cir. 1981) (holding that announcement of authority and purpose at front door was sufficient to meet knock and announce requirement, refuting any duty to repeat notice at inner bedroom door). In the instant case, this Court has already found that Detective Perry had given notice of his authority and purpose to Marie Wolfe upon entering the residence and prior to entering the vault. The issue thus becomes whether Perry was required to again "knock and announce" at the vault door. It is clear from the federal case precedents that Perry was not required to

"re-announce" at the entrance to the vault. A contrary finding would lead to ludicrous results. Police officers would be unnecessarily hampered in performing lawful searches if required to repeatedly give "notice of authority and purpose" upon entering any closed inner door inside the residence. Neither the michigan statute nor its federal counterpart requires such repetition. *See* United States v. Bragg, 138 F.3d 1194 (7th Cir. 1998) (holding that § 3109 applies "per house rather that per door"). Thus, there was no violation of M.C.L. § 780.656.

NOW, THEREFORE, IT IS HEREBY ORDERED that defendant's motion to suppress fruits of a state search warrant is **DENIED.**

**SO ORDERED.**

Dated: 9/1/98 /s/ Paul V. Gadola
HON. PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**UNITED STATES OF AMERICA,**
***Plaintiff,***

Eastern Dist.
of Michigan
Filed 1/13/99

**CASE NO. 97-50065**

**vs.** **HONORABLE PAUL V. GADOLA**
**U.S. DISTRICT JUDGE**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

**MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S AMENDED AND SUPPLEMENTAL MOTION TO SUPPRESS THE FRUITS OF A STATE SEARCH WARRANT AND DENYING DEFENDANT'S MOTION TO QUASH WARRANTS OF 12/23/96 AND 1/15/97, SUPPRESS EVIDENCE, DISMISS THE INDICTMENT, AND/OR DISMISS COUNTS I THROUGH IX, COUNT XII, AND COUNTS XVI THROUGH XVIII OF THE FIRST SUPERSEDING INDICTMENT**

Presently, before the Court is defendant Ronald Napoleon Wolfe, Sr.'s Amended and Supplemental Motion to Suppress the Fruits of a State Search Warrant filed on September 30, 1998. The government responded to defendant's motion on October 23, 1998. On November 23, 1998, defendant untimely filed a reply brief

entitled, "defendant's response to the government's October 23, 1998 response." On December 30, 1998, this court issued an order granting the United States' motion to strike said reply brief pursuant to Local Rule 7.1 (E.D. Mich. Sept. 8, 1998).

Also, before the Court is defendant's Motion to Quash Warrants of 12/23/96 and 1/15/97, Suppress evidence, Dismiss the Indictment, and/or Dismiss Counts I through IX, Count XII, and Counts XVI through XVIII of the First Superseding Indictment. The government responded to defendant's motion to quash on October 26, 1998.

Previously, on September 1, 1998, this Court issued a memorandum opinion and order denying defendant's motion to suppress fruits of a state search warrant. Evidentiary hearings were conducted on July 30, July 31, and August 24, 1998. The above-entitled case arises out of the execution of a six-page state search warrant at defendant's residence on December 23, 1996. On that date, officers from the Livingston County Sheriff's Department, Michigan State Police and Brighton State Police went to defendant's premises to assist in the entry of the premises and/or execution of the warrant. After entering the house, defendant was arrested and his wife, Marie Wolfe, was given a copy of the search warrant to review. As a result of the ensuing search, the officers seized from a vault located in the basement of the house, and behind a secret

door, the following items: a long "plant growing light," a water pump, electric timers, a humidity gauge, 8 plastic pots and 17 marijuana growing plants. Also inside the vault the officers found scores of firearms. After locating receipts for only twelve weapons, the officers seized 86 firearms. *See* United States v. Wolfe, 22 F. Supp. 2d 627, 630-31 (E.D. Mich. 1998) (Gadola, J.).

For the reasons set forth below, the Court will deny defendant's Amended and Supplemental Motion to Suppress the Fruits of a State Search Warrant and deny defendant's Motion to Quash Warrants of 12/23/96 and 1/15/97, Suppress Evidence, Dismiss the Indictment, and/or Dismiss Counts I through IX, Count XII, and Counts XVI through XVIII of the First Superseding Indictment.

## I. PROCEDURAL HISTORY

The instant case commenced December 3, 1997, when the grand jury returned an indictment charging defendant Wolfe with 21 federal firearms violations. Each count of the indictment was based on weapons seized by state officers during the execution of a state search warrant on December 21, 1996 at defendant's residence. Defendant moved to suppress from evidence all seized firearms, alleging that the warrant was invalidly issued and executed. As mentioned above, this Court conducted an evidentiary hearing on July 30, July 31, and August 24, 1998. On

September 1, 1998, this Court issued a memorandum opinion and order discussing the various issues raised in defendant's motion to suppress. The Court held that (1) Detective Perry properly swore to the affidavit; (2) the affidavit sworn to by Detective Perry on December 23, 1996 is not invalid on the basis of defendant's claim that it contained false or misleading assertions of material fact; (3) there was probable cause to search defendant's entire premise based on the affidavit; (4) even if the affidavit does not establish probable cause, the good faith exception to the warrant requirement is applicable to validate the search in the case at bar; (5) whether the defendant consented to a search of the vault is moot; (6) seizure of the firearms is valid under the plain view exception to the warrant requirement; and (7) M.C.L. § 780.656 was not violated. *See* United States v. Wolfe, 22 F. Supp. 2d 627 (E.D. Mich. 1998) (Gadola, J.).

The original indictment was returned by a grand jury which had been unconstitutionally selected, pursuant to the Sixth Circuit's ruling in U.S. v. Ovalle, 136 F.3d 1092 (6th Cir. 1998). The government therefore presented the case to a new grand jury, which subsequently returned a First Superseding Indictment on August 19, 1998. The First Superseding Indictment is identical to the original indictment, except that it adds a new Count 22. That count charges defendant with illegally manufacturing marijuana at his residence beginning on an unknown date and a

continuing until the date of the search, December 21, 1996, in violation of 21 U.S.C. § 841.

## II. DEFENDANT'S AMENDED AND SUPPLEMENTAL MOTION TO SUPPRESS THE FRUITS OF A STATE SEARCH WARRANT

### A. Previously resolved issues

In the amended and supplemental motion, defendant concedes that the following issues have been adequately resolved for purposes of appellate review:

1. Whether Detective Perry swore to the affidavit submitted to Judge Hegarty on December 23, 1996;
2. Whether the affidavit presented to Judge Hegarty on December 23, 1996 contained false or misleading assertions of material facts;
3. Whether the affidavit presented to Judge Hegarty set forth sufficient facts, attributable to reliable sources, to support a finding of probable cause;
4. Whether Judge Hegarty critically evaluated the affidavit, or did he simply accede to the requests made in the affidavit and search warrant;
5. Whether there was a sufficient factual basis within the four corners of the affidavit to support a finding that Detective Perry relied in good faith on the search warrant;

6. Whether Detective Perry's entry into the gun vault complied with the requirements of M.C.L. § 780.656;

7. Whether Detective Perry's seizure of the firearms from the gun vault occurred in conformity with the plain view exception; and

8. Whether defendant consented to the search of the gun vault.[1]

*See* Defendant's Amended and Supplemental Motion, pp. 9-10.

**B. Issues about which defendant is uncertain as to their resolution**

Defendant states that he is uncertain as to whether the following issues have been resolved:

1. Whether the search warrant described the property to be searched for and seized with

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[1] Defendant maintains that although this Court has not specifically decided the issue of whether the search of the gun vault was consented to by defendant, the issue has been sufficiently preserved for appeal. *See* Defendant's Amended and Supplemental Motion, p.10 n.2; *see also* U.S. v. Wolfe, 22 F. Supp.2d 627, 641 (E.D. Mich. 1998) (Gadola, J.). The Court agrees that the issue has been preserved. In the previous opinion of September 2, 1998, this Court held that whether defendant had consented to the search of the vault was moot because the government has never alleged, nor does it intend to allege, that the search of the vault was authorized by defendant's consent. *Id.*

sufficient particularity to satisfy the Fourth Amendment;

2. Whether the search warrant described the place to be searched with sufficient particularity to satisfy the Fourth Amendment;

3. Whether the execution of the search warrant was overly broad so as to require suppression of all evidence seized from defendant's home on December 23, 1996.

*See* Defendant's Amended and Supplemental Motion, p. 11. The government contends that this Court's previous opinion has resolved these issues, albeit by implication, against defendant, at least with respect to the seized firearms. The government concedes that the Court did not decide these issues with respect to the seized marijuana because Count 22 was added by the First Superseding Indictment, and was not addressed in defendant's prior motion to suppress.

These three issues all concern the validity of the underlying search warrant, as well as the manner of its execution. In the previous opinion, this Court explicitly stated that it found the warrant to be valid and enforceable, based upon probable cause as evidenced by the supporting affidavit of Detective Perry. *See* Wolfe, 22 F. Supp.2d at 636. In addition, the Court held that even if the warrant were defective, the search would still have been proper based upon the good faith exception to the exclusionary rule. *See Id.* at 640 (*citing* United States v. Leon, 468 U.S. 897, 920-21, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), *reh'g*

*denied,* 468 U.S. 1250, 105 S.Ct. 52, 82 L.Ed.2d 942 (1984)). Furthermore, the Court expressly acknowledged that the state search warrant did not authorize the police to search for and seize firearms. *Id.* at 641. Nevertheless, seizure of the firearms was held to be valid under the plain view exception to the warrant requirement. *See Id.* (*citing* Horton v. California, 496 U.S. 128, 142, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990)).

In light of this Court's previous rulings on the subject, defendant will not be permitted to relitigate issues regarding the validity of the search warrant and its execution. With respect to the applicability of these prior rulings to the marijuana seized during the search on December 23, 1996, defendant has advance no reason why the plain view exception, ad discussed and applied in the previous opinion, would not apply equally to both the seized firearms and to the marijuana. *See Id.* The three requirements of the plain view exception have been satisfied, to wit: (1) the marijuana was in plain view; (2) the incriminating character of the marijuana was immediately apparent, and (3) the marijuana was viewed by an officer lawfully located in a place from which the marijuana could be seen and seized by an officer who had a lawful right to access to the marijuana itself. *See Id.* Therefore, this Court finds that the prior rulings as set forth in the September 1, 1998 opinion will be extended to

encompass the seizure of the marijuana and associated items.

### C. A new issue raised by defendant regarding M.C.L. § 780.655, and not previously addressed by this Court

Lastly, defendant raises an issue which has not been previously advanced. This issue may be phrased as follows:

> whether M.C.L. § 780.655 was violated when, on February 3, 1997, the Livingston County Sheriff's Department transferred 26 firearms and/or firearm-related items to the custody of the Bureau of Alcohol, Tobacco and Firearms (ATF), which items had been seized previously by Detective Perry from defendant's home on December 23, 1996.

*See* Defendant's Amended and Supplemental Motion, pp. 11-14. The discussion below will focus on this newly raised issue, not previously addressed in this Court's prior rulings. As the United States points out, this issue could have been raised in defendant's previous motion to suppress. Therefore, according to the United States, it should be dismissed as untimely. Nevertheless, since the issue relates to conduct allegedly occurring after execution of the warrant on December 23, 1996, this Court will consider the issue on its merits hereinbelow.[2]

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[2]It should be mentioned that defendant has made no allegation of a violation of M.C.L. § 780.655 with respect to the seized marijuana. As the government points out, the

Pursuant to M.C.L. § 780.655, when an officer in the execution of a search warrant seizes any property, the officer is required to make a "complete and accurate tabulation" of the property and the things so seized. *Id.* According to the statute, the officer must then "give to the person from whom or from whose premises the property was taken a copy of the warrant and shall give to the person a copy of the tabulation upon completion . . . ." *Id.* Section 780.6565 further provides that the officer shall "file the tabulation promptly with the court or magistrate." *Id.* "The property and things so seized shall be safely kept by the officer so long as necessary for the purpose of being produced or used evidence on any trial." *Id.*

According to defendant, Detective Perry did not provide defendant nor his wife with a complete and accurate tabulation of items seized. In addition, defendant alleges that the officer did not "safely keep" the property seized from the Wolfe residence. According to defendant, on February 3, 1997, Detective Perry turned over the firearms to ATF Agents Evans. Defendant argues that such conduct violates M.C.L. § 780.655, and that to permit introduction

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marijuana was never transferred to the AFT. According to the government, the marijuana is currently in the custody of the state officers and will likely remain in their custody until introduced as evidence at trial.

of such evidence against defendant would work a violation of due process of law under the Fourteenth Amendment.

The government responds that this argument is not timely raised. Even if considered timely, the United States contends that the argument clearly lacks merit. The government acknowledges that custody of the firearms was delivered to the ATF shortly after seizure. However, the prosecution maintains that defendant has made no showing that the evidence was not "safely kept" in accordance with the Michigan statute. Furthermore, even if the statute is interpreted to mean that the seizing officer must keep the evidence in the custody of his own state agency, the government maintains that no part of the statute itself, nor any case law, indicates that the remedy for such a violation is suppression of the evidence. The government does not address defendant's allegation that officers failed to provide defendant with a tabulation of seized items.

In People v. Lucas, 188 mich. App. 554, *appeal denied*, 439 Mich. App. 888 (1991), the Michigan Court of Appeals held that a technical violation of the "complete tabulation" requirement pursuant to M.C.L. § 780.655 does not require suppression of the seized evidence. *See Id.* at 573. In Lucas, police officers committed a technical violation of M.C.L. § 780.655 when they neglected to make a complete tabulation of all items seized and failed to give copies of the warrant and a tabulation "forthwith" to the person from whom items were taken. *See Id.* However,

defendant in that case was provided with such documents at his arraignment. *See Id.* The Michigan appellate court held that "this 'hypertechnical' violation of the statute does not require suppression of the evidence seized, particularly where defendant cannot articulate any harm or prejudice that resulted." *See Id.* (*citing* People v. Myers, 163 Mich. App. 120, 122-123, 413 N.W.2d 749 (1987) and People v. Tennon, 70 Mich. App. 447, 245 N.W.2d 756 (1976)).

Michigan courts have also addressed the failure of officers to "safely keep" seized evidence. *See* In re Forfeiture of $25,505, 220 Mich. App. 572 (1996). In that case, the Michigan Court of Appeals held that failure to "safely keep" seized evidence in violation of M.C.L. § 780.655 creates a rebuttable presumption that unpreserved evidence would have been adverse to the government. *Id.* at 579-80. The court commented that "a ministerial defect did not void the effectiveness of the warrant or contaminate the evidentiary value of the property seized under the warrant." *Id.* at 578 (quoting People v. Tennon, 70 Mich. App. 447, 450 (1976) (internal quotation marks omitted)). Furthermore, "any defect in failing to give the defendant a copy of the search warrant at issue was 'hypertechnical in nature and did not prejudice defendant and, as a result, the evidence seized pursuant to the search warrant should not be suppressed.'" *Id.* (*quoting* People v. Myers, 163 Mich. App. 120, 122 (1987)).

In view of the Michigan case law discussed above, defendant's request to suppress the firearms based upon an alleged technical violation of M.C. L. § 780.655 must be denied. Defendant has made no showing nor has he even asserted that any prejudice flowed to defendant from either the failure to immediately provide a tabulation of items or from the transfer of the weapons to the ATF. Defendant has failed to cite any authority for the proposition that the Michigan statute's "safely keep" requirement prohibits the transfer of items seized for the legitimate purposes of testing and evaluation.

The government makes the additional argument that the Michigan statute has no application to the instant case. As a case involving the prosecution for violations of federal laws in a federal court, the statute, according to the United States, should have no bearing on the suppression of evidence question. While it is true that "states are not free to impose on Federal courts requirements more strict than those of Federal laws or [the] Constitution," this Court need not reach the issue of whether the requirements of M.C.L. § 780.655 are more or less strict than those imposed by the federal Constitution. *See* United States v. Combs, 672 F.2d 574, 578 (6th Cir.), *cert. denied,* 458 U.S. 1111 (1982); *see also* United States v. Allen, 954 F.2d 1160 (6th Cir. 1992); United States v. Loggins, 777 F.2d 336, 338 (6th Cir. 1985). Even assuming that M.C.L. § 780.655 were applicable to the case at bar, and also assuming *arguendo*

that the state police officers had somehow violated the statute, such a violation would not, under the Michigan case law cited above, warrant suppression of the firearms. Defendant simply has not made any showing of harm or prejudice which would warrant suppression. Even if the state agents had failed to "safely keep" the 26 firearms, defendant would be entitled, at most, to rebuttable presumption and not suppression.

For the reasons set forth above, this Court will deny defendant's Amended and Supplemental Motion to Suppress the Fruits of a State Search Warrant.

## III. DEFENDANT'S MOTION TO QUASH WARRANTS OF 12/23/96 AND 1/15/97, SUPPRESS EVIDENCE, DISMISS THE INDICTMENT, AND/OR DISMISS COUNTS I THROUGH IX, COUNT XII, AND COUNTS XVI THROUGH XVIII OF THE FIRST SUPERSEDING INDICTMENT

Defendant has filed an additional motion seeking to quash two search warrants, suppress evidence, dismiss the indictment and/or dismiss the firearms counts of the indictment. This motion addresses issues arising not just from the search conducted on December 23, 1996, but also from subsequent searches conducted on January 16, 1997, pursuant to search warrants issued on January 15, 1997. According to defendant's motion, Mr. Wolfe's house was "again raided and some of the tax records had been returned

to Wolfe's house." Brief in Support of Motion to Quash, p. 2. Also on January 16, 1997, the DEA raided Wolfe's mother's gun shop, "and seized 'tax records' and turned them over to Livingston County as evidence." *Id.*[3]

At the outset, the government argues that to the extent defendant seeks to suppress any items seized during the execution of the additional search warrants on January 16, 1997, defendant's motion should be denied as moot. Counsel for the government has advised defendant that the United States does not intend to offer in evidence any documents or items seized pursuant to the January 15, 1997 warrant. As a consequence, the Court will deny as moot defendant's motion, insofar as it seeks suppression of evidence seized on January 16, 1997.

In the instant motion, defendant raises the following three arguments, which will be discussed hereinbelow: (1) that disclosure of tax "return information" in the December 23, 1996 warrant and/or affidavit supporting the search warrant constitutes a violation of the Internal Revenue Code, and that the use of confidential information is unlawful; (2) that under Federal Rule of Criminal Procedure 41, only a federal law enforcement office or a U.S.

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[3]The government provides the date of January 15, 1997, one day prior as the date for the execution of these subsequent search warrants. *See* Government's Brief in Support of Response to Defendant's Motion to Quash, p.2.

Attorney is authorized to request a search warrant for federal tax records; (3) that defendant may not be found guilty of possession of an unregistered machine gun pursuant to 26 U.S.C. § 5861(d), because to do so would violate due process, as defendant is precluded by law from complying with the requirements of 26 U.S.C. § 5861(d).

### A. Whether disclosure of "return information" in the December 23, 1996 search warrant or in the supporting affidavit constituted a violation of the Internal Revenue Code, and thus requires suppression of evidence

Defendant argues that the December 23, 1996 warrant is unlawful because it relied upon the following language: "[i]nvestigation with agent Randy Evans of the [ATF] has determined that Ronald Napoleon Wolfe has a Federal Firearms Dealer License." Defendant also claims that Agent Evans revealed that Wolfe possessed a federally issued Class III firearm license. However, the supporting affidavit contains no such disclosure. Furthermore, the government denies that Agent Evans revealed the type of license involved. To the contrary, the United States maintains that witness Al Perry testified at the hearing held on July 31, 1998 that Evans refused to tell him what type of license Wolfe possessed.

Defendant claims that inclusion of language in the warrant revealing that Wolfe has a federal firearms dealer license is a violation of 26 U.S.C. § 6103. That section prohibits government employees from disclosing tax returns and tax return information. Defendant has cited no case law holding that an individual's status as a licensed firearms dealer is "return information" within the meaning of Section 6103. Furthermore, even in the event that a dealer's status were considered "return information," defendant has cited no case law holding that suppression of evidence is the appropriate remedy.

The government directs the Court's attention to United States v. Hunter, 863 F. Supp. 462 (E.D. Mich. 1994) (Rosen, J.), wherein the district court considered whether the government's disclosure of defendant's "ATF Form 3 transfer papers" in a non-tax criminal proceeding violated 26 U.S.C. § 6103. Judge Rosen stated that "the Court does not see the need to resolve the issue of whether the government violated § 6103's confidentiality provisions in the investigation or prosecution of this case." *Id.* at 477. The court continued, "[t]his is because even if the Court were to hold that § 6103 was violated . . . it is largely settled that suppression and dismissal are inappropriate remedies for such a violation." *Id.* (*citing* United States v. Michaelian, 803 F.2d 1042 (9th Cir. 1986).

Defendant attempts to distinguish Hunter on the ground that that opinion does not discuss 26 U.S.C. § 5848,

a statute arguably applicable in the instant case. Section 5848 provides, in pertinent part, that

> [n]o information or evidence obtained from an application, registration, or records required to be submitted or retained by a natural person in order to comply with any provision of [the National Firearms Act] or regulations issued thereunder, shall, except as provided in subsection (b) of this section, be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence.

26 U.S.C. § 5848 (a) (emphasis added). However, as the government points out, Judge Rosen had considered Section 5848 in a previous opinion issued in the same case. *See* United States v. Hunter, 843 F. Supp. 235, 249-253 (E.D. Mich. 1994). In that earlier decision, the court found that as long as the information was not used "as evidence," but merely for purposes of investigation, there was no violation of the statute. *See Id.* at 252. As the court specifically noted:

> § 5848(a) bars the use of such records as evidence. The Court reads this provision to prohibit the introduction of protected records in a trial; it does not appear to proscribe the Government's utilization of the records so far in this case in order to investigate and indict Defendants. Furthermore, and more pointedly, should the Government wish to use the records as evidence in trial, the Court believes

> that the "future crimes" and "furnishing false information" exceptions in § 5848 permit it to do so. A step-by-step review of each of the registrations and recordkeeping events set out in the indictments supports the Court's conclusion.

*Id.* (emphasis added).

In keeping with the decisions in United States v. Hunter, this Court finds that neither 26 U.S.C. § 6103 nor 26 U.S.C. §5848 (a) is an appropriate basis for suppression of the evidence in the case at bar. The government argues that it does not need to introduce the fact that defendant is a licensed firearms dealer to prove any element of the crimes charged. *See* United States' Brief in Response to Defendant's Motion to Quash, p. 5. Since the government does not intend to introduce such evidence, and has merely used information regarding Wolfe's status as a licensed firearms dealer for investigative purposes, Section 5848's prohibition is not applicable. In addition, again following Judge Rosen's lead in Hunter, this Court need not decide whether Section 6103 has been violated in view of the fact that suppression and dismissal are inappropriate remedies for such a violation. *See* United States v. Hunter, 863 F. Supp. 462, 477 (E.D. Mich. 1994) (*citing* United States v. Michaelian, 803 F.2d 1042 (9th Cir. 1986)).

### B. Whether, under Federal Rule of Criminal Procedure 41, only a federal law enforcement officer or a U.S. Attorney is authorized to request a search warrant for federal tax records

Defendant further argues that since federal courts have exclusive jurisdiction over federal tax issues, a state court judge is not authorized to issue a search warrant to local law enforcement officers to seize federal tax records. In an attempt to support this position defendant cites Federal Rule of Criminal Procedure 41 (a), providing that "[u]pon request of a federal law enforcement officer or an attorney for the government, a search warrant . . . may be issued . . . by a federal magistrate judge or a state court . . . .").[4] In the case at bar, defendant argues that federal ATF agent Evans did not personally request issuance of the December 23, 1996 search warrant. Instead, the warrant

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[4]Federal Rule of Criminal Procedure 41 (a) provides a full:

(a) Authority to Issue Warrant. Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate judge, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate judge for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.

was requested by Detective Perry, a state law enforcement officer. As a consequence, defendant requests suppression of the evidence seized.

The government responds that defendant's argument rests upon the erroneous assumption that the object of the search warrant was the seizure of federal tax codes. The language of the warrant supports the prosecution's position that tax records were not the target of the officers' search. Rather, the warrant is aimed at uncovering evidence relating to various items allegedly stolen by defendant. The warrant authorizes a search for:

> [d]ocuments or evidence indicative of the ownership or occupancy of the . . . premises; insurance records including contracts, claim forms and payment forms; bales of hay; golf carts; records relating to building materials for the structures on the premises; shingle samples; building material samples; photographs; records relating to the purchase, ownership or registration of firearms; records relating to the possession, ownership or registration of vehicles; records or evidence relating to horse ownership, sales or veterinary treatment.

*See* United States' Brief in Response to Defendant's Motion to Quash, p. 7. As is apparent from the above enumeration, the search warrant was not targeted at uncovering federal tax records.

The Court agrees with the government's position that defendant's argument relies on a mistaken assumption. furthermore, and more importantly, defendant has cited no

authorize a search for federal tax records as evidence of facts pertinent to state law offenses. Defendant has utterly failed to provide any legal authority for his assertion that the "basic principles of federalism have been clearly violated in this case." Defendant's Brief in Support of Motion to Quash, p. 9. The only authority cited for this allegation is Federal Rule of Criminal Procedure 41. However, no part of that rule in any way buttresses defendant's position that state courts are prohibited from issuing warrants relating to federal tax records.

### C. Whether defendant may be found guilty of possession of an unregistered machine gun pursuant to 26 U.S.C. § 5861 (d), when, according to defendant, he is precluded by law from complying with the requirements of 26 U.S.C. § 5861 (d)

Defendant's last argument concerns the interplay between two statutes: 26 U.S.C. § 5861 (d) and 18 U.S.C. § 922 (o). Section 922 (o) bans the private possession of any machine gun made after the effective date of the Firearm Owners' Protection Act (FOPA) on May 19, 1986.[5] Section 5861 (d) of the National Firearms Act

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[5] 18 U.S.C. § 922 (o) provides, in full, as follows:

(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machine

(NFA) prohibits a person from receiving or possessing "a firearm which is not registered to him in the National Firearms Registration and Transfer Record." 26 U.S.C. § 5861 (d).[6] Defendant argues that "it is simply a violation

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gun.

(2) This subsection does not apply with respect to--

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machine gun that was lawfully possessed before the date this subsection takes effect.

[6] 26 U.S.C. § 5861 contains the following prohibitions:

It shall be unlawful for any person--

(A) to engage in business as a manufacturer or importer of, or dealer in, firearms without having paid the special (occupational) tax required by section 5801 for his business or having registered as required by section 5802; or

(B) to receive or possess a firearm transferred to him in violation of the provisions of this chapter; or

(C) to receive or possess a firearm made in violation of the provisions of this chapter; or

(D) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

(E) to transfer a firearm in violation of the provisions of this chapter; or

(F) to make a firearm in violation of the provisions of this chapter; or

(G) to obliterate, remove, change, or alter the serial number or other identification of a firearm required by this chapter; or

(H) to receive or possess a firearm having the serial number or other identification required by this chapter obliterated, removed, changed, or altered; or

(I) to receive or possess a firearm which is not identified by a serial number as required by this chapter; or

(J) to transport, deliver, or receive any firearm in interstate commerce which as not been registered as required by this chapter; or

(K) to receive or possess a firearm which has been imported or brought into the United States in violation of section 5844; or

of due process for the government to continue to arrest citizens for failing to file a tax return and pay their federal income taxes if Congress passed a law prohibiting the government from accepting tax returns and tax payments [with respect to banned machine guns]." Defendant's Brief in Support of Motion to Quash, p. 12.

At the outset, it should be noted that defendant's argument applies only to machine guns manufactured after May 19, 1986. According to the government, at least two of the machine guns involved in the instant case were manufactured during World War II, and therefore possession of these items would not be illegal pursuant to Section 922 (o), assuming they were appropriately registered. Furthermore, defendant's argument would obviously not be applicable to the silencers, pen guns, short-barreled rifle, or other items seized by the officers on December 23, 1996.

In response to defendant's argument, the government cites appellate court decisions holding that Section 922 (o) did not repeal 26 U.S.C. § 5861 (d). *See* United States v. Ardoin, 19 F.3d 177, 179-80 (5th Cir. 1994); *see also* United States v. Jones, 976 F.2d 176 (4th Cir. 1992), *cert.*

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(L) to make, or cause the making of, a false entry on any application, return, or record required by this chapter, knowing such entry to be false.

United States v. Jones, 976 F.2d 176 (4th Cir. 1992), *cert. denied,* 508 U.S. 914 (1993). Defendant cites Ardoin as well, but relies upon language of the dissenting opinion. Defendant's Brief in Support of Motion to Quash, p. 12. In addition, the Eighth Circuit has directly addressed the relationship between these two statutes in United States v. Elliott, 128 F.3d 671 (8th Cir. 1997), wherein the court stated as follows:

> [Defendant] Elliott contends his § 5861 (d) conviction for failure to register the machine gun violates due process. Elliott argues § 5861 (d) was implicitly repealed by the later-enacted § 922 (o) (1), which prohibits possession of a machine gun. Because Elliott can comply with both statutes by simply refusing to possess the machine gun, we agree with the Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits that the statutes are reconcilable. *See* United States v. Hunter, 73 F.3d 260, 261-62 (9th Cir. 1996); United States v. Rivera, 58 F.3d 600, 601-02 (11th Cir. 1995); United States v. Ardoin, 19 F.3d 177, 179-80 (5th Cir. 1994); United States v. Ross, 9 f.3d 1182, 1193-94 (7th Cir. 1993), *vacated on other grounds,* 511 U.S. 1124 (1994); United States v. Jones, 976 F.2d 176, 182-83 (4th Cir. 1992); *but see* United States v. Dalton, 960 F.2d 121, 123-24 (10th Cir. 1992). In sum, Elliott was fairly convicted under § 5861 (d).

Elliott, 128 F.3d at 672 (emphasis added). This Court agrees with the reasoning articulated in the Elliott decision. The two statutes - Section 5861 (d) and Section 922 (o) (1) - are not irreconcilable. A person may easily comply with

possess the illicit machine guns. Defendant's argument attempts to circumvent Congress's intent, as expressed in Section 922 (o), by creating the illusion of a contradiction where none exists.

Despite the Tenth Circuit's decision in United States v. Dalton, 960 F.2d 121 (10th Cir. 1992), and a district court's ruling in United States v. Gambill, 912 F. Supp. 287 (S.D. Ohio 1996) (Spiegel, J.), the great weight of authority has affirmed the Elliott court's holding that these two statutes are indeed reconcilable. In United States v. Djelaj, 842 F. Supp. 278 (E.D. Mich. 1984) (Rosen, J.), the court strongly criticized the Dalton decision, stating that:

> [t]he Court finds the analysis in [United States v. Jones, 976 F.2d 176 (4th Cir. 1992) and [United States v. Ross, 9 F.3d 1182 (7th Cir. 1993)] clearly superior to that of Dalton. Just as the defendant in Jones could have complied with both the NFA [26 U.S.C. § 5861 (d)] and § 922 (o) by not dealing in newly-made machine guns, so, too, Defendants in this case could have complied with NFA § 5861 (d) and Michigan's ban on Molotov cocktails by not possessing those destructive devices in the first place. Dalton's impossibility analysis is therefore flawed, and this Court declines to apply it. Furthermore, this Court believes that there is nothing fundamentally unfair with holding Defendants to answer for their breach of federal law regardless of what state law may say. If this were not the case, federal criminal statutes could be enforced only in states which agreed with and accepted them. This is a preposterous contention.

> Defendants' arguments to dismiss the indictment, then, when boiled down to their essence, collapse under simple common-sense . . . .

Djelaj, 842 F. Supp. at 281 (footnotes omitted).

This Court will join the Djelaj court in rejecting Dalton. Just as in Djelaj, defendant Wolfe's request in the instant case to dismiss certain counts in the indictment will be denied. Mr. Wolfe's due process rights have not been violated because of an alleged inability to comply with both of the above-discussed statutes. The two statutes ar compatible, as shown above, despite defendant's impossibility argument.

For the reasons set forth above, this Court will deny defendant's Motion to Quash Warrants of 12/23/96 and 1/15/97, Suppress Evidence, Dismiss the Indictment, and/or Dismiss Counts I through IX, Count XII, and Counts XVI through XVIII of the First Superseding Indictment.

## ORDER

**NOW, THEREFORE, IT IS HEREBY ORDERED** that defendant's Amended and Supplemental Motion to Suppress the Fruits of a State Search Warrant is **DENIED;**

**IT IS FURTHER ORDERED** that defendant's Motion to Quash Warrants of 12/23/96 and 1/15/97, Suppress Evidence, Dismiss the Indictment, and/or Dismiss

**IT IS FURTHER ORDERED** that defendant's Motion to Quash Warrants of 12/23/96 and 1/15/97, Suppress Evidence, Dismiss the Indictment, and/or Dismiss Counts I through IX, Count XII, and Counts XVI through XVIII of the First Superseding Indictment is **DENIED;** insofar as defendant's motion seeks suppression of evidence seized on January 16, 1997, it is **DENIED AS MOOT.**
**SO ORDERED.**

Dated: 1/13/99

/s/ Paul V. Gadola
HON. PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

**STATE OF MICHIGAN**
**IN THE CIRCUIT COURT**
**FOR THE COUNTY OF LIVINGSTON**

**PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***

**CASE NO. 99-9961**

**vs.**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

**PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***

**CASE NO. 99-9962**

**vs.**

**MARIE ELIZABETH WOLFE,**
***Defendant.***

State of Michigan,
Circuit Court
Filed 6/19/98

**OPINION and ORDER**

Pending before the Court are Defendants' motions to quash a search warrant issued December 23, 1996, which authorized a search of their home, outbuildings, and property located in Livingston County, and to suppress evidence which was seized pursuant to the execution of said warrant.

The Livingston County Prosecutor has filed numerous separate criminal cases against both Ronald Wolfe Sr. and his wife Marie in this Court, and this motion will unquestionably have an effect on some of those cases as well. Defendants are charged in the instant cases with manufacturing the controlled substance marijuana, with intent to deliver, contrary to MCL 333.7401(2)(d)(iii); MSA 14, 15 (7401).

An evidentiary hearing on this motion was conducted on February 9th, 10th, 11th and 23rd, and March 2nd, 6th, 17th and 18th, 1998. Briefs were thereafter filed by the parties. Testimony was taken from the Honorable Michael K. Hegarty, Lt. Ivan Deering, Detective Alan Perry, Chief Assistant Prosecutor Dan Garber, Detectives John Westendorf, Ed Moore, Robert Swackhammer and Todd Luzod, Sgt. Victoria York, Deputies James Bolling and Michael Hawry, William Harp, Harold Van Patten, Ronald Wolfe, Sr. and Marie Wolfe. Twenty-four (24) exhibits were received into evidence.

**ISSUES**

Defendants have raised the following issues:

1. Was the December 19, 1996 affidavit properly sworn to as required by the Constitution of the United States, and the Michigan Constitution and Statutes?

2. Does the affidavit include sufficient facts to satisfy the probable cause requirements of the United States and Michigan Constitutions, so as to have permitted the

officers to enter upon the Defendant's premises on December 23, 1996 to search for any evidence of crime or contraband?

3. Does the affidavit include sufficient facts to satisfy the probable cause requirements of the Constitutions of the United States and Michigan, so as to have permitted the officers to search the Defendants' home, other than in order to secure it as an incident to the Defendant's arrest?

4. Did the officers who executed the search warrant comply with the requirements of MCL 780.656; MSA 28.1259(6) prior to their entry into the gun vault?

5. Can the seizure of items upon the Defendant's premises, in the home, or from within the gun vault, be justified under the "plain view" exception to a valid search and seizure?

Defendants argue that the answer to each of these questions is NO.

The Prosecution failed to directly respond to the five issues as framed. Instead, the Prosecutor rephrased the legal issues into four of its own, and then proceeded to answer its own questions. The Court undertakes analysis of the issues raised from the perspective that the Prosecution argues that the answer to each of these questions raised is YES.

## BACKGROUND

As a result of an investigation of certain claimed conduct of Ronald Wolfe, Sr., the Livingston County Sheriff's Department requested, and was granted, a search warrant for the home, outbuildings, and property of Defendants Ronald and Marie Wolfe, all of which are situated on a 60-acre parcel located in Howell Township. Livingston County, Michigan.

To that end, the affidavit and proposed search warrant were drafted by Chief Assistant Prosecutor Daniel Garber. He signed and dated the same on December 19, 1996. Prior thereto, he interviewed the detective in charge of the case. Detective Alan Perry; witnesses Harold Van Patten and William Harp; and reviewed various police reports. Harp and Van Patten gave both Detective Perry and Chief Assistant Prosecutor Garber information which implicated themselves as participants in one or more of the crimes charged against Ronald Wolfe, Sr. Each were given assurances by Perry and Garber that they would not be prosecuted as a result of these admissions, however, no immunity order was ever entered by the Court.

Although the affidavit and warrant were authorized by Garber December 19, 1996, it was not taken to a judge for authorization until December 23, 19976, he day that it was executed.

As described in the affidavit, the investigation concerned the theft of two wagon loads of hay, which were stolen from Oceola Township on August 19, 1996; building materials, which were stolen from Byron Road on September 15, 1996; roofing materials, which were stolen from Fisher Road on September 28, 1996; two golf carts which were stolen from the Oak Pointe Golf Course on January 7, 1995; two horses, which were stolen May 23, 1996, from a neighbor who lives four miles away; and an insurance fraud claim allegedly made by Defendant Ronald Wolfe, Sr. on or about September 14, 1994.

The warrant was taken to the home of District Judge Michael K. Hegarty at about seven o'clock in the morning, December 23, 1996, following which he issued the same. Thereafter, at about eight o'clock a.m., in reliance upon the search warrant thus obtained a team of officers from the Michigan State Police, the Sheriff's Department, and the City of Brighton entered Defendants' home and property and conducted an extensive day-long search of their residence, grounds, outbuilding and automobiles.

The officers also came armed with a valid warrant for the arrest of Defendant Ronald Wolfe, Sr., Mr. Wolfe was immediately arrested upon entry into the residence, and thereafter he was taken to the Livingston county Jail.

Harold Van Patten had informed the police that he had constructed a hidden gun vault for Wolfe in the basement of the home, which was located behind moveable

bookcases. Discovery of the bookcase hinges and the subsequent release of its locking device allowed officers to swing open the shelves from the center, thus revealing the otherwise concealed door to the vault. When the officers found that the vault door was locked with a combination lock, they attempted to secure the combination from Mrs. Wolfe, who was still on the premises. When it was determined that she could not assist them, calls were made to the Livingston County Jail in an attempt to secure the combination from Mr. Wolfe. The officers were determined to enter the vault, with or without the combination. After securing the combination from Mr. Wolfe, they entered the vault under the assumed authority of the search warrant which they had obtained from Judge Hegarty early that morning.

Within that vault they discovered numerous weapons, many of which were loaded, together with various gun parts and ammunition, and a small active marijuana growing operation. Perry then made a call to the Prosector's office for advice on what to do following this discovery, after which the officers seized the marijuana and all of the weapons within the home. Ronald Wolfe, Sr. was a licensed gun dealer, and numerous loaded weapons were found in many locations throughout the home.

A myria of other items of evidence were also seized all of which Defendants now seek to have suppressed.

## DISCUSSION

### ISSUE 1

**Was the December 19, 1996 affidavit properly sworn to as required by the Constitution of the United States, and the Michigan Constitution and statutes?**

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Article 1, ¶11 of the 1963 Michigan Constitution provides:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other

dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

It is clear that both the United States and Michigan Constitutions require search warrants to be based upon probable cause, supported by oath or affirmation. The Legislature has enacted MCL 780.651(1); MSA 28.1259(1) to implement this constitutional mandate.

MCL 780.651; MSA 28.1259(1), provides in pertinent part as follows:

> (1) When an affidavit is made on oath to a magistrate authorized to issue warrants in criminal cases, and the affidavit establishes grounds for issuing warrant pursuant to this act, the magistrate, if he or she is satisfied that there is probable cause for the search, shall issue a warrant to search the house, building, or other location or place where the property or thing to be searched for and seized is situated.
>
> (2) An affidavit for a search warrant may be made by any electronic or electromagnetic means of communication if both of the following occurs:
>
> (a) The judge or district court magistrate orally administers the oath or affirmation to an applicant for a search warrant who submits an affidavit under this subsection.
>
> (b) The affiant signs the affidavit. Proof that the affiant has signed the affidavit

> may consist of an electronically or electromagnetically transmitted facsimile of the signed affidavit.
>
> ***
>
> (6) If an oath or affirmation is orally administered by electronic or electromagnetic means of communication under this section, the oath or affirmation is considered to be administered before the judge or district court magistrate.

Affidavits for search warrants must be sworn to by the person named as the affiant therein. "It is well established that a search warrant can issue only on probable cause supported by oath or affirmation. *See,* MCL 780.651:MSA 28.1259(1)." *People v. Lovett,* 85 Mich App 534, 538; 272 NW2d 126 (1978), Iv app den, 412 Mich 904 (1982).

Detective Perry, shown on the warrant to be the affiant, testified during the hearing that he personally took the affidavit and warrant to Judge Hegarty's home in Hartland Township on the morning of December 23, 1996, where it was presented to the judge, who read the affidavit, administered him an oath, and signed the warrant.[1]

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[1]See Vol. L p38. L 25; Vol III, p79.L 25-p80. L18:p 119. L 16-18: p 126.L 11-p 130, L3: p 204. L 5-p 204, L2; p 220. L 3-24.

It was clear to this Court at the time Perry's testimony was offered, that there was something wrong with his recitation of events, since those having current local familiarity would know that Judge Hegarty, who had lived in Hartland Township for some 25 years had moved to Brighton Township less than a month before December 23, 1996.[2]

Some days after Perry's testimony on this issue, during the trial of one of the other pending cases against Ronald Wolfe, Sr.,[3] Deputy James Bolling testified that it was he and Deputy Michael Hawry, both uniformed officers, who carried Perry's "affidavit" and warrant to Judge Hegarty's Brighton Township home for signature the early morning hours of December 23, 1996.[4] Bolling testified that the search team, including the Michigan State Police entry team, assembled early that morning at the Detective Bureau to make appropriate preparations for the search. Perry was in charge and gave Bolling instructions to take the affidavit and warrant to the judge's home for

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[2]Judge Hegarty later testified to this move himself when called as a witness.

[3]File No.97-9958 FH.

[4]March 11, 1998 special record testimony during jury trial file 97-9958. T p 68-74, 79.

signature. Neither Bolling nor Hawry were named as the affiant on the affidavit.

A careful comparison of the testimony of the judge and all of the witnesses who testified on the matter, leads to the inescapable conclusion that Detective Perry did not take the affidavit to the judge's home for signature that morning, as he had testified. Both Bolling and Hawry demonstrated excellent memory of the incident, were consistent in their testimony about making the run, and supported their testimony with Bolling's log sheet, which showed that they had made the run at seven o'clock in the morning, December 23, 1996.[5] Bolling clearly remembered having taken the paperwork to the judge's home in Brighton Township, as indicated by his memory of a comment made on they way that the judge might not appreciate being awakened so early in the morning. The times indicated on Bolling's log sheet were consistent with the times inserted on the affidavit and warrant by the judge as he was reviewing and signing the same.

Perry was in charge of making preparations for the search at the Detective Bureau when he gave the paperwork to Bolling, and assigned he and Hawry the task of making the run to the judge's home. Uniformed officers appeared

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[5]March 11, 1998, special record testimony during jury trial, file 97-9958. T p 53-116.

at the judge's home that morning.[6] Detective Luzod testified that Perry, a detective, does not wear a uniform and had not been required to wear a uniform for many years. Judge Hegarty had no independent recollection of Perry being at his home to secure the warrant that morning.

The District Judges in Livingston County have been furnished fax machines in order to streamline the process of securing search warrants from a judge's home. However, Judge Hegarty's fax machine was apparently unreliable. When utilized, the officer will initiate a telephone call to the judges home, be administered an oath, and then fax the signed affidavit and warrant to the judge for signature. Where there is an unsuccessful attempt to fax the warrant to a judge, the officers must then drive it over to the judge's home. It is clear from the testimony of Judge Hegarty, Perry, Bolling, and Hawry that the fax method of securing a warrant was not utilized here, and there is no direct evidence in the record that Perry was administered an oath during any telephone conversation with Judge Hegarty.

In its brief, the Prosecution argues that Perry testified that he had called the judge that morning, and that the judge testified that he talked to Perry on the telephone that morning. The record does not support the Prosecutor's position that either witness testified to these facts. On the contrary, Perry testified that he personally went to the

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[6]T Vol VIII, p 21, 25-26.

judge's home in Hartland for the purpose of presenting the affidavit. He testified that he was administered an oath at the judge's home, and that he judge signed the warrant in his presence.[7] The judge testified that he had no recollection of talking to Perry on the telephone that morning, nor any recollection of Perry being at his home that morning.

The argument presented by the Prosecution presumes that the procedure used to obtain the search warrant was a consequence of the fax machine not working that day. The only testimony presented regarding the functioning of the fax machine was by Deputy Hawry. He testified that the fax machine was working, but due to the length of the affidavit and search warrant, it was more expeditious to just physically take the paperwork to the judge.[8] After a break in his testimony, Deputy Bolling testified that he took the affidavit and search warrant to the judge because the fax machine was broken. However, he testified that he was not aware that the fax machine was broken until the recess

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[7]The Prosecution also notes this testimony from Detective Perry, however, fails to recognize a conflict.

[8]See March 11, 1998 special record testimony during jury trial in file 97-9958. T p 108-116.

during his testimony, at which time the examining Prosecutor told him that the fax machine was broken.[9]

Since giving his testimony in this matter, Detective Perry abruptly resigned from the Sheriff's Department in the face of criminal allegations against him suggesting obstruction of justice in another unrelated case in which he was involved as an investigating officer. When recalled to testify by Defendant, he asserted his Fifth Amendment rights.

Other unresolved conflicting evidence in this matter is also disturbing. Particularly, Detective Perry has identified Lt. Deering, the chief of the Detective Bureau as one of the persons who accompanied the search team to the Wolfe property that morning.[10] Deering has absolutely denied these assertions, and log sheets attached to Defendant's brief indicate that Deering may not have worked that day. While it is unnecessary to resolve either this or other conflicts now, they serve as a source of concern as other testimony is examined.

Testimony establishes that there is no love lost between Lt. Deering and Defendant Ronald Wolfe, Sr. The depth of this feeling was graphically illustrated when Deering testified that if he observed Wolfe on fire, he

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[9]March 11, 1998 special record testimony during jury trial, file 97-9958. T p 91-95.

[10]See T Vol. II p 33-35.

would refrain from quenching the conflagration with water.[11] This testimony is one basis for Marie Wolfe's argument (brief, p.17) that Perry had a motive to perjure himself concerning circumstances surrounding the issuance of the warrant.

This Court has already found on the record that it does not believe the testimony of Detective Perry that he personally took the affidavit and warrant to Judge Hegarty's home for signature. His testimony in this regard in incredulous. On the other hand, the Court restates here that it believes the testimony of both Bolling and Hawry that it was they, and not Perry, who took the affidavit to the judge's home for the purpose of securing a search warrant that morning. There is adequate evidence in this record that Detective Perry signed the affidavit, but no credible direct evidence that Detective Perry was administered the requisite oath by Judge Hegarty.

Like the judge in *People v. Mitchell,* 428 Mich. 364; 408 NW2d 798 (1987), Judge Hegarty testified that he had no independent recollection of administering an oath to Perry. Also, like the judge in *Mitchell, supra,* he testified that from habit he would not authorize a warrant without having the affiant attest to the facts supporting the search warrant. However, unlike *Mitchell, supra,* there is no

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[11]T Vol VIII, p 118.

credible affirmative testimony here that Perry was administered an oath.

Neither party has directed the Court's attention to any case law directly on point. The question is whether evidence of the judge's habit, coupled with a signed affidavit is sufficient to conclude that the affidavit was supported by oath or affirmation as required by law, when the name affiant did not have the only contact he claims to have had with the judge.

*People v. Tice,* 220 Mich App 47; 558 NW2d 245 (1996), recognizes that a search warrant which lacks an affiant's signature is presumed to be invalid, and relying upon *Mitchell, supra,* that the presumption can be rebutted by a showing that the facts in the affidavit were presented under oath to the magistrate who authorized the warrant. By corollary, an affidavit and warrant which appears on its face to be valid, is also subject to the claim that it is invalid for want of the requisite oath or affirmation.

Here, Judge Hegarty has testified that by custom he would have administered an oath before signing a search warrant. Such evidence is admissible on the question of validity, MRE 406, and is sufficient to overcome the other evidence on the matter. *Hendrickson v. Moghissi,* 158 Mich App 290; 404 NW2d 728 (1987). Accordingly, Defendant's motion to quash the search warrant on the basis that the affiant was not placed under oath is DENIED.

**ISSUE 2**

**Does the affidavit include sufficient facts to satisfy the probable cause requirements of the United States and Michigan Constitutions, so as to have permitted the officers to enter upon the Defendant's premises on December 23, 1996 to search for any evidence of crime or contraband?**

**ISSUE 3**

**3. Does the affidavit include sufficient facts to satisfy the probable cause requirements of the Constitutions of the United States and Michigan so as to have permitted the officers to search the Defendant's home other than in order to secure it as an incident to the Defendant's arrest?**

The same assertions must be addressed for each of these arguments, so this Court will address them together. Defendants' arguments raised several issues relating to the sufficiency of the warrant based upon the allegations regarding the theft and/or storage of various items, together with allegations of a claimed insurance fraud. Each professed crime form the basis for the search warrant and each will be discussed separately.

The affidavit must contain facts within the knowledge of the affiant, as distinguished from mere conclusions or belief. An affidavit made on information and belief is not sufficient. The affidavit should clearly set forth the facts and circumstances within the knowledge of the person making it, which constitute the grounds of the application. The facts should be stated by distinct averments, and must be such as in law would make out a cause of complaint. *It is not for the affiant to draw his own inferences. He must state matters which justify the drawing of them. People v. Rossborough* 387 Mich 183, 199 (1972), [emphasis supplied] citing 2 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 868, p 1129.

In reviewing an affidavit in support of a search warrant the magistrate's task

... is simply to make a practical, common-sense decision whether given all the circumstances set forth in the affidavit before him including the "veracity" and "basis of knowledge" of persons supply hearsay information there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates* 462 US 213, 238: 103 S C: 2317;76 L Ed 2d 527.548 (1983) (citation omitted).

*Illinois v. Gates* also guides this Court's review of the issuance of the search warrant:

[T]he duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ...

> conclud[ing]" that probable cause existed. *Illinois v. Gates, supra,* at 238-239. (Citations omitted).
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> The Prosecution has asked that this Court keep in mind that:
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> Affidavits are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. *United States v. Ventresca,* 380 US 102, 108; 85 S Ct 741; 13 L Ed2d 684 (1985).

While this principal should generally be considered, it is simply not the case here. Testimony established that Chief Assistant Prosecuting Attorney Dan Garber drafted the affidavit and search warrant, and that it was done over a period of time.[12] In fact, the Chief Assistant Prosecutor that "authored" this search warrant and affidavit interviewed two of the informants.[13] Perry testified that much of the language used in the affidavit was the 'author's choice.'[14]

First, Defendants claim that the warrant is devoid of information concerning the "veracity" and "basis of

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[12]T Vol III. 82-83; Vol VI, p9.

[13]T Vol IV, p 10-11.

[14]See T Vol II. p 176-180: Vol III. p 10-14; Garber agreed Vol IV, p9.

knowledge" of persons supplying hearsay information alleging that there is fair probability that contraband or evidence of a crime would be found in a particular place, and second they claim that the information contained in the affidavit was stale, citing *People v. David,* 119 Mich App 289; 326 NW2d 485 (1982). Finally, they claim that the facts contained in the affidavit do not supply any basis to suspect that evidence of the crimes set out in the affidavit would be found in the Wolfe residence.

**THE HAY**

Pages 2 and 3 of the affidavit detail the substance of the claim dealing with stolen hay. In narrative form, with facts not attributed to anyone in particular, the reader is told: "on August 19, 1996 at approximately 12:30 A.M. to wagon loads of hay were stolen from a hay field ...." It then continues with details, some of which are apparently attributed to Deputy Thomas Dorsey's police report, some to Harold Van Patten, and some to the affiant, Detective Perry. The basis for concluding that the stolen hay was somehow connected to the Wolfe property is found in a statement attributed to Harold Van Patten.

> The hay wagons were hitched to the pickup trucks and driven to the above premises to be searched were (sic) the hay was unloaded and subsequently stacked in the airplane hangar structure

> north/northeast of the residence on those premises. Van Patten noted that the hay wagons had to be driven through an area of pine trees to get to the airplane hangar structure and affiant has personally verified that numerous pine trees are in the vicinity on the premises ....Affiant has personally verified that Wolfe has livestock on the premises to be searched which utilize hay as part of their diet. Through affiant's investigation, it has been determined that Ronald Napoleon Wolfe knew the prior Lessee of the hay field's (sic) in question and knew of the hay field location.

Defendants assert that the credibility of Van Patten had not been established either by a recitation of any facts or vouched for in the form of assertions of having previously provided reliable information to Detective Perry. Defendants argue that the indicia of credibility attributable to Van Patten would be the appearance of an admission against penal interest. However, upon Perry's first meeting with Van Patten. Perry informed him that he would not be prosecuted.[15]

Where material information is omitted from an affidavit and that information has a bearing upon a probable cause finding for issuance of a search warrant evidence seized pursuant to a search warrant which would not have

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[15]Van Patten testified that Perry "assured me that the Prosecutor...was not gonna [issue] charges against me as long as I cooperate." T Vol VI,p 136-137.

otherwise been obtained but for the absence of that information must be suppressed if the omission was intentional. *People v. Kort,* 162 Mich App 680; 413 NW2d 83 (1987), 1v den 430 Mich 860 (1988).

Further, Defendants note that there are statements of fact in the affidavit which Perry alleges to have personally verified. Particularly, that there are "numerous pine trees in the vicinity on the premises;" and that "Wolfe has livestock on the premises to be searched which utilize hay as part of their diet." Detective Perry testified that he had never been to the Wolfe residence before executing the search warrant. He initially testified that this verification was made during a fly over.[16] Later, he acknowledged that the fly over occurred after the affidavit was drafted and approved by Garber.[17] Perry testified that the basis for his personal verification of presence of livestock was through his interview with Van Patten, and that he believed Swackhammer possibly told him the same.[18] Detective Swackhammer was on the premises between July 18, 1995 and September, 1995.[19] Both statements regarding

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[16]T Vol I. p 15-17.

[17]T Vol II. p 72-74.

[18]T Vol II. p 173.

[19]T Vol V. p 85.

affiant's personal verification were misleading. Likewise, literary license was taken in the statement that both Wolfe and Wolfe, Jr. were armed with *automatic* pistols. Perry testified that reference to 'automatic pistols' was an error by the author which Perry missed during his review of the approved affidavit.[20]

> [I]f false statements are made in an affidavit in support of a search warrant, evidence obtained pursuant to the warrant must be suppressed if the false information was necessary to a finding of probable cause. In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause. (citations omitted) *People v. Strumpf,* 196 Mich App 218, 224; 492 NW2d 795 (1992), citing *Franks v. Delaware,* 438 US 154; 98 S Ct 2674; 57 L Ed2d 667 (1978).

Perry testified that the term "personal verification" means that he obtained the information through interviews.[21] There is a specific meaning to the term

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[20]T Vol II. p 173.

[21]T Vol II p 15-16.

"personally," such that a person using it as a modifier should know that it has a meaning distinct from simple verification through interviews. Information independently verified lends credibility to the informant and bolsters a finding of probable cause. *People v. Harris,* 191 Mich App 422; 479 NW2d 6 (1991); *People v. Sellars,* 153 Mich App 22, 27; 394 NW2d 133 (1986). An indication of verification, which is in fact conducted through the same informant, is deceitful.[22] Defendant has established that false information was inserted with reckless disregard for the truth. Under *Strumpf,* the false statements must be redacted.[23]

Neither the affidavit nor testimony elicited during the hearing demonstrate any continuing thefts of hay. Notwithstanding this fact or the lapse of four months from the theft to the date of warrant authorization, the magistrate could conclude from the affidavit that some of the hay might still be found in the airplane hangar. However, there is no basis in the affidavit upon which one might come to the conclusion that there was probable cause to believe that any of the stolen hay would be found inside the residence.

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[22]T Vol II p 173, 174.

[23]Language in the affidavit that ATF was conducting an investigation regarding fraud and larceny is also inaccurate. (T Vol II, p 115-116) However, this information does not appear to be necessary to a finding of probable cause.

## BUILDING MATERIALS

The substance of the claim dealing with stolen building materials is found on page 3 of the affidavit. Like the allegations concerning the stolen hay, it starts out in narrative form, not attributed to anyone in particular.

> In the early morning hours of September 15, 1996, building materials were stolen from the construction site of a new home located at 5195 Byron Road, Howell Township, Livingston County. Included within the stolen materials were approximately 172 sheets of 4 x 8 x 7/16 OSB board, twenty 2 x 12 x 16 boards, thirty 2 x 4 x 14 boards, fifteen 2 x 6 x 16 boards and three boxes of 8D nails....

The affidavit goes on to state that the theft was reported to the police by a third party. Further, that Harold Van Patten supplied information that he was employed by Ronald Wolfe, Sr. to construct a new pole barn located southeast of the Wolfe residence, and that: "during the time frame in question, Wolfe provided a delivery of building materials which matched the itemized list of property stolen from the construction site at 5195 Byron Road." Additionally, that "Ronald Napoleon Wolfe, Ronald Nap Wolfe, Jr. and Richard Herbert Culbert subsequently admitted that those materials had been stolen from the Byron Road construction site."

Similar to their claims concerning the hay, Defendants claim that the warrant is devoid of information concerning the "veracity" and "basis of knowledge" of persons supplying hearsay information that there is fair probability that contraband or evidence of a crime will be found in a particular place, and that information contained in the affidavit was false. Particularly, Defendants note that the allegation that Defendant Ronald Napoleon Wolfe admitted to Van Patten that the materials were stolen from the Byron Road construction site is false.

In their brief, the People suggest that Van Patten saw Defendant deliver to his residence, items matching the stolen items during the same time frame. The affidavit asserts that "Wolfe provided a delivery." Van Patten testified that he went to bed one night and when he got up the next morning it was there.[24]

Again, striking the claimed admission from the affidavit, the magistrate still would have some basis to conclude that the building materials might be located at the site of the pole barn. Like the situation with the hay, there is no factual basis in the affidavit upon which one might come to the conclusion that there was probable cause to believe that any of the building materials would be found inside the residence.

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[24]T Vol VI. p 138.

## ROOFING MATERIALS

The claim dealing with the stolen roofing materials is contained on pages 3 and 4 of the affidavit. This claim also proceeds in narrative form without reference to the information source.

> During the early morning hours of September 28, 1996 a quantity of roofing materials was stolen from the construction site of a residence located at 5110 Fisher Road in Oceola Township, Livingston County. Those materials included dark brown shingles, ice guard, 15 lb. felt and 90 lb. rolled roofing.

The affidavit recites the discovery of the theft, a report to the police, and statements, again attributed to Harold Van Patten that he saw the materials on the roof of the building at the victim's property, and

> [s]hortly thereafter, Ronald Napoleon Wolfe made a delivery of roofing materials to the pole barn under construction on the premises to be searched. The roofing materials provided by Wolfe matched the itemized list of the roofing materials stolen from the Fisher Road construction site and the shingle color of those materials also matched the color of the shingles stolen from the Fisher Road construction site.

The affidavit again describes an admission from Wolfe to Van Patten that Wolfe had stolen the roofing materials at the Fisher Road site so that they could be used on the pole barn under construction. It goes on to describe that Van Patten also noticed that the Wolfe shingles were damaged, consistent with having been thrown off the victim's roof, the place where Van Patten had first seen them. It also recites a confirmation by William Harp that he personally observed the color of the shingle on Wolfe's pole barn.

Defendants assert that the alleged admissions contained in the affidavit are inconsistent with Detective Perry's pre-affidavit write-up of his interview with Van Patten. The Prosecution relies on this purported admission to establish probable cause. False and misleading information must be redacted from the affidavit. Perry testified that Van Patten stated that Ron Wolfe, Jr. and Rick Culbert delivered the shingles.[25] He also acknowledged that the statement in the affidavit that Wolfe made a delivery of roofing materials was an assumption.[26] Further, Perry testified that he did not remember a statement by Van Patten that admissions were made by Ron Wolfe, Sr. and Ron Wolfe, Jr. that they had stolen the

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[25]T Vol III. p 10.

[26]T Vol III. p 10.

shingles.[27] Perry testified that the claimed admission may have been made to Garber, the drafter of the affidavit.[28] Again, Perry explained it as an assumption.

> ...I can only assume that it did come from him. It's half right.
>
> I missed it. It was just poor judgment on my part and not going further in detail word for word into the affidavit. (Vol III T p 14, L 2-10).

The affidavit professes further verification of the stolen roofing materials through affiant's interview with William Harp, who observed the pole barn under construction. The affidavit asserts that Harp "verified the dark brown color of the shingle provided by Ronald Napoleon Wolfe which were nailed onto the roof by Harold Van Patten." William Harp testified that he spoke with Detective Perry about the golf carts. Further, that he reviewed the write-up of that interview with the Prosecutor and Perry, and did not speak to the Prosecutor regarding the hay, building materials, roofing materials, or horses.[29]

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[27]T Vol III. p 12, 13.

[28]T Vol III, p 13.

[29]T Vol VI. p 49-50.

Again, like the situation with the hay and the building materials, there are no facts stated in the affidavit which would cause the magistrate to come to the conclusion that the roofing materials would be found on or within the residence.

**GOLF CARTS**

> The golf cart claim is set forth on pages 4 and 5 of the affidavit.
>
> Affiant is also investigating the theft of two golf carts from the Oak Pointe Golf Course located at 5341 Brighton Road, Genoa Township, Livingston County. On or about January 7, 1995 two gas driven cream in color "Club Car" golf carts were stolen from the golf course.

The affidavit then describes a report to the Michigan State Police, and the content of an interview with William harp who indicated that he (Harp) helped Defendant Ronald Wolfe steal two cream colored "Club Car" golf carts from the golf course, that Wolfe gave one of the carts to Harp, and that the other was taken to the Wolfe property. The affidavit went on to say:

> Affiant has verified through serial numbers that the golf cart in Harp's possession was one of the two carts stolen from the Oak Pointe Golf Course on January 7, 1995. Additionally, Harold Van Patten

> provided a photograph taken in October, 1996 to affiant which depicts a golf cart parked near the log constructed residence on the premises to be searched. Additionally, Affiant has spoken to Detective Robert Swackhammer of the Michigan State Police and Swackhammer indicated that he has observed golf carts on the property to be searched while he was there on an unrelated matter.

Defendants again argue that there is no basis for Mr. Harp's credibility. Similar to the statements attributed to Van Patten regarding the hay, Defendants note that the indicia of reliability attributed to Harp's statements against interest is weakened when the officer of immunity is revealed. They further argue that the statement, "Affiant has verified through serial numbers that the golf cart in Harp's possession was one of the two carts stolen from the Oak Pointe Golf Course..." was false.

Detective Perry testified that he could not remember if he verified the golf cart serial number himself, or if he received the information from Detective Swackhammer.[30] Swackhammer testified that he did not speak with Harp until after the search o the 23rd.[31] Further, that he did not provide Perry with the 'verified information' alleged in the

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[30]T Vol III p 26-27.

[31]T Vol p 98, Vol VI p 22-23.

affidavit.[32] He further testified that due to a bookkeeping error at the golf course, the golf cart from Harp's property was not listed as missing.[33] Interestingly, Harp testified that Wolfe had removed the serial numbers from both carts in Harp's garage the night of the theft.[34]

Again, there are no articulated facts in the affidavit from which the magistrate could come to the conclusion that there was probable cause that a golf cart would be found inside the Wolfe residence.

**STOLEN HORSES**

The affidavit describes the investigation of the theft to two horses which were stolen May 23, 1996. The affidavit describes the interview with Van Patten who said that in mid May, 1996 Defendant brought two horses to the property and that they were kept there for approximately three weeks, then removed on a Saturday. It further states that:

> [t]hrough various witness interviews and investigations affiant has determined that Ronald

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[32]T Vol VI. p 119.

[33]T Vol VI. p 100-109.

[34]T Vol VI. p 69-70.

> Napoleon Wolfe and the owners of the Michigan Horse Auction at 7335 Old U.S. 23 in Fenton are close friends. Affiant has further determined that horse auctions are conducted on Saturdays at the Michigan Horse Auction premises.

Other statements attributed to Van Patten attempt to link the horses at the Wolfe property to those that were stolen. Testimony elicited at the evidentiary hearing reveals that at the time that the affidavit was created, Perry was aware that the owner of the horses had contacted the Michigan Horse Auction, and that the horses had not been seen.[35] This is a material omission. Based upon the overview provided by the Prosecutor in arguing that probable cause as established, this Court notes that the affidavit suggests that Van Patten was provided one photograph and identified one horse. This Court further notes the Prosecutor's argument that "...it is reasonable to infer that the defendant sold the stolen horses...."(Brief p 8).

There are no facts stated in the affidavit which would justify a conclusion that there was probable cause to believe that these horses would be found at the Wolfe property. On the contrary, the clear conclusion to be drawn is that the horses would not be found there. Indeed, Perry testified that "[t]he only thing that my investigation led me

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[35]T Vol III. p 48-49.

to believe was that they had been removed from the premises." (T Vol III p 39).

**INSURANCE CLAIM**

The factual allegations concerning the insurance fraud claim are contained on pages 5-6 of the affidavit. "Affiant is investigating a potential insurance fraud crime involving new windows which were installed in the log construction residence on the above premises to be searched." It then details a conversation with William Harp, who indicated that in the summer of 1994 Ronald Wolfe stored a shipment of new residential windows at his (Harp's) residence. According to Van Patten, Ronald Wolfe, Jr. began delivering the windows to the Wolfe home for installation in repeated pickup truck loads to the fully framed home. It then states:

> Affiant, subsequently interviewed Harold Van Patten's brother Scott Van Patten, who indicated that Ronald Napoleon Wolfe had stated that he had made an insurance claim and recovered money for his "stolen windows." Affiant believes that the windows had originally been delivered to the construction site, and thereafter concealed at Harp's residence for sufficient time for Wolfe to make a fraudulent insurance claim for a phony theft of said windows.

The only statement regarding an appropriation is attributed to Scott Van Patten. The Prosecution's suggestion that Defendant admitted to Scott Van Patten that his windows were stolen and that he had made an insurance claim has no basis in the affidavit or hearing.[36] The statement not only makes no nexus to an insurance fraud, it is attributed to a person mentioned for the first and only time in the same sentence. There is no basis for the magistrate to determine the veracity of Scott Van Patten, other than that he is Harold Van Patten's brother. The affidavit lacks even pro forma statements that Scott Van Patten is a credible person. The test to determine if probable cause exists based upon information received from an informant is whether the affidavit furnishes facts from which the magistrate could conclude that the information was based on personal knowledge and that either the unnamed person was credible or that the information was reliable. *People v. Poole,* 218 Mich App 702, 706; 555 NW2d 485 (1996).

Furthermore, nothing contained in the affidavit suggests that any evidence related to this speculative crime ever existed at any place. The affidavit is void of any information that would amount to a fair probability that evidence of this chimera would be found on the Wolfe residence, thus prohibiting the issuance of a search warrant.

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[36]T Vol III. p 55-57.

*Illnois v. Gates,* 462 U.S. 213; 103 S ct 2317; 76 L Ed2d (1983).

The allegations in the "insurance fraud" portion of the affidavit are so clearly lacking in facts that one could hardly find probable cause that a crime had been committed, much less that evidence of that crime would be at the Wolfe residence. The affiant's conclusions based on his own belief is insufficient to meet the requirements for issuance of a search warrant. *People v. Rosborough,* 387 Mich 183; 195 NW2d 255 (1972). The allegations concerning the insurance claim would not justify the issuance of a warrant for any portion of the property.

> The affidavit for search warrant lists the "person, place, or thing to be searched" as:
>
> The entire premises including the residence and outbuildings commonly referred to as 5753 Fisher Road; said premises include a multi story log construction residence located on the west side of Fisher Road in Section I of Howell Township, Livingston County, a gray barn with a brown roof having living quarters in the upper story that is located south of the log constructed residence, a new pole barn with a dark brown shingled roof and OSB siding located southeast of the log constructed residence and a gray airplane hangar structure with a steel roof located north/northeast of the log constructed residence.

The facts establishing probable cause or the grounds for the search have been set forth above. As stated with each alleged crime, there is no evidence which would justify a search of the entire premises, particularly including the log constructed residence. The hay was taken to the airplane hangar, the shingles were taken to the new pole barn, and the building materials were taken to the area where the pole barn was to be constructed.[37] The only structures upon the premises in which any evidence of any of the alleged crimes may be found are the new pole barn with a dark brown shingled roof and OSB siding, and a gray airplane hangar structure with a steel roof. A search of any other structure of the premises was not supported by probable cause.

Defendants have also objected to the over broad nature of items to be seized. The affidavit for search warrant describes the "property to be searched for and seized, if found" as:

> Documents or evidence indicative of the ownership or occupancy of the above premises; insurance records including contacts, claim forms and payment forms; bales of hay; golf carts; records relating to building materials for the structures on the premises; shingle samples; building material samples; photographs; records relating to the purchase,

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[37]T Vol III. p 200-202; Vol IV. p 29-31.

ownership or registration of firearms; records relating to the possession, ownership or registration of vehicles; records or evidence relating to horse ownership, sales or veterinary treatment.

MCL 780.652; MSA 28.1259(2) Property subject of search; provides:

Sec. 2 A warrant may be issued to search for and seize any property or other thing which is either:

(a) Stolen or embezzled in violation of any law of this state.

(b) Designed and intended for use or which is or has been used as the means of committing a criminal offense.

(c) Possessed, controlled or used wholly or partially in violation of any law of this state.

(d) Evidence of crime or criminal conduct on the part of any person.

(e) Contraband.

(f) The bodies or persons of human beings or of animals, who may be the victims of a criminal offense.

(g) The object of a search warrant under any other law of this state providing for the same. If a conflict exists between this act and any other search warrant law, this act shall be deemed controlling.

As to "[d]ocuments or evidence indicative of the ownership or occupancy of the above premises," the affidavit provides: "through investigation, public records, and affiant's personal knowledge, it has been determined

that Ronald Napoleon Wolfe resides at the above place to be searched." Perry testified to numerous independent sources wnich verified that Mr. Wolfe lived at the premises.[38] Garber testified that there was not a great deal of questions that Wolfe owned and occupied the premises, they had previously verified that he paid taxes and that it was his mailing address, and people had gone to the premises to see who lived there.[39] Proof of residency was not required.

The "insurance records including contracts, claim forms and payment forms" were requested in connection with the insurance claim, discussed above. Likewise, bales of hay, golf carts, shingle samples, and building material samples are discussed above.

In asserting their position regarding the over breadth of the property to be seized, Defendants note that the search warrant allows the officers to seize all bales of hay; which they did, irrespective of the presence of a 'funny loop' in the rope. This is significant in that there was testimony that there were bales of hay in the hangar other than those which Van Patten had described as stolen.[40] All of the hay was seized. Detective Perry testified that he "had it

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[38]T Vol III. p 59.

[39]T Vol IV. p 27-28.

[40]T Vol VI. p 189.

hauled off by the victim Mr. Salom." (T Vol II. p 133). Defendants note that fifty-one (51) OSB boards were seized, which were not listed on the return. Similarly, the OSB board was seized and returned to the victim.[41] The affidavit described an investigation of two stolen golf carts. One of which was accounted for in the affidavit as being on Harp's premises. The search resulted in the seizure of two golf carts from the Wolfe premises. Of those two, one was not listed as missing by Oak Pointe.[42]

The affidavit also requests clearance to search for records relating to building materials for the structures on the premises, photographs, records relating to the possession, ownership or registration of vehicles, records or evidence relating to horse ownership, sales or veterinary treatment. There is nothing contained within the affidavit for search warrant that would establish these items existed or probable cause to search for these items as evidence connected to any crime.

Further, the affidavit lists records relating to the purchase, ownership or registration of firearms as items to be searched for and seized. Other than the reference within the individual crime investigation narratives, the affidavit provides in a separate paragraph:

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[41]T Vol III. p 147.

[42]T Vol VI. p 100-109.

> In interviews with Harold Van Patten and William Harp along with other witnesses, it has been determined that Ronald Napoleon Wolfe commonly carries a handgun even when he is engaged in activities such as going to a grocery store (sic). Van Patten, Harp and others have personally observed numerous firearms on the premises to be searched. Investigation with agent Randy Evans of the Alcohol, Tobacco and Firearms Division has determined that Ronald Napoleon Wolfe has a Federal Firearms Dealer License and Affiant has verified that Wolfe has registered firearms within Livingston County.

This recitation suggests to the magistrate that a variety of firearms, properly registered, likely exist on the property. Again, nothing in the affidavit supports a need to search for or seize records of ownership or registration of firearms.

Defendants support their allegation that the search warrant was overly broad by supplying a rough list of items that were not named in the search warrant yet seized.[43] The over breadth of the search warrant also requires recognition of how the officers conducted the search, what they understood their authority to be under the warrant, and

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[43]This rough list is contained in Defendant Marie Wolfe's brief. For a more detailed analysis of what authority was used for the items seized see T Vol II. p 131-168, and T Vol III. P 167-170.

what they seized. Perry testified that he seized any records that had to do with weapons, for example a blank Florida CCW permit.[44] One of the items seized, a cassette tape marked "I Love You," was seized because the officers did not know what was on the tape, and they had authority to take it under "records."[45] Pursuant to an investigation and under the authority of the search warrant, Perry searched for records regarding golf carts without knowing or alleging that any existed.[46] The search warrant asked for permission to seize photographs of stolen property, yet Perry acknowledged that there was no information that such photos existed.[47] Likewise, he acknowledged that there was no information that records relating to vehicles would be on the premises, and there was no evidence that horse ownership records, sales or veterinary treatment records existed.[48]

While the affidavit speaks to only one (1) stolen golf cart, the search warrant authorized a search for and seizure of *golf carts.* Garber explained this as common sense. "If

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[44]T Vol II. p 92.

[45]T Vol II. p 93.

[46]T Vol III. p 31, 34.

[47]T Vol III. p 73-74.

[48]T Vol III. p 74-76.

the guy's got one that you know is stolen, I'd say it's pretty likely that the other one was stolen too,...." (T Vol IV. p 33-34).

Detectives Perry and Moore testified that as a matter of policy, officers check serial numbers on any and all items found on the property that have a serial number or might be stolen. They do this by calling dispatch or to whoever appeared to be the appropriate owner and attempt to discover if it was stolen or not. If the item was reported stolen, it was seized on the basis of an exigent circumstance.[49] If the officer was unable to determine if a suspect item was stolen, further investigation would be required and the item was seized.[50]

Various reasons were offered for seizing the weapons. Perry testified that he did not have nay authority to search for or seize guns under the search warrant.[51] He testified that there was no security issue as to the weapons in the vault.[52] They were seized due to the presence of marijuana, after checking with the Prosecutor.[53] Knives,

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[49]T Vol II. p 79-87; Vol IV. p 156-162.

[50]T Vol II. p 89-90;p 99-102.

[51]T Vol I. p 80-86.

[52]*Id.*

[53]T Vol I. p 87-88.

magazines, barrels, and the like were seized pursuant to authority given by the Prosecutor's office.[54] There was testimony by Perry that guns were seized because they were mentioned in the search warrant and affidavit, specifically only in the affidavit.[55] He testified that he was told by Garber to seize all guns from every room.[56] Perry testified that he had no particular intention to seize weapons, dependant upon the circumstances.[57] He gave the example that a weapon would be seized if a serial number came up stolen.[58] At one point he said, irrespective of what reason he wrote down, the reason that he seized the guns was the presence of marijuana. It was after the guns were being collected that the absence of records came to mind as another reason.[59] Whatever reason Perry had for seizing the weapons, he voluntarily turned some of them over to ATF.[60]

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[54]T Vol II. p 88-89.

[55]T Vol II. p 62.

[56]T Vol II. p 69.

[57]T Vol II. p 66; p 110.

[58]T Vol II. p 66.

[59]T Vol II. p 52.

[60]T Vol III. p 147-151.

Chief Assistant Prosecutor Garber testified that the absence of a specific request to seize firearms was an error on his part.[61] According to Garber, officers were expected to seize guns as part of the search.[62] The request to seize records related to firearms, included seizure of the firearms themselves.[63] Swackhammer testified that the weapons were seized because Wolfe had threatened Perry.[64] Although Wolfe was taken into custody and removed to the Livingston County Jail, weapons were taken because people are entitled to bond.[65] Detective Luzod testified that no firearms were seized until Perry directed that, according to the Prosecutor, all weapons were to be seized.[66]

The Prosecutor now argues in its brief that the guns were properly seized from the vault in the basement pursuant to the forfeiture statute. Specifically, the People

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[61]T vol IV. p 42.

[62]T Vol IV. p 57-58.

[63]T Vol IV. p 83.

[64]T Vol V. p 113; But see Detective Moore write-up starting threats were made during second search warrant.

[65]T Vol V. p 115.

[66]T Vol VII. p 57.

rely upon MCL 333.7522; MSA 14.15(7522) which provides:

> Property that is subject to forfeiture under this article or pursuant to section 7521 may be seized upon process issued by the circuit court having jurisdiction over the property. Seizure without process may be made under any of the following circumstances:
>
> (a) Incident to a lawful arrest, pursuant to a search warrant, or pursuant to an inspection under an administrative inspection warrant.
>
> (b) The property is the subject of a prior judgment in favor of this state in an injunction or forfeiture proceeding under this article or pursuant to section 17766a.
>
> (c) There is probable cause to believe that the property is directly or indirectly dangerous to health or safety.
>
> (d) There is probable cause to believe that the property was used or is intended to be used in violation of this article or section 17766a.

The Prosecutor argues that, once the officers gained entry into the gun vault the marijuana was readily observable, through both sight and smell. This discovery, they argue, triggered the authority to seize the weapons found in close proximity under the drug forfeiture statute.

This Court has previously discussed the authority of the officer's presence in the Wolfe residence. This authority did not extend to the gun vault. Further, as

recognized by the People, no odor of marijuana could be detected when the vault door was closed.[67] Thus the officers had no olfactive observation upon which to base their entry into the separate locked room. Finally, no forfeiture action was ever initiated in connection with the seizure of the weapons or any other property taken from the Wolfe premises that day.

## VERACITY OF INFORMANTS

The affidavit does not provide for the veracity of either Mr. Harp or Mr. Van Patten, nor any other of the unidentified interviewee's. The affidavit simply provides:

> Through the course of the investigation, Affiant has had occasion (sic) to personally interview Harold Van Patten who resided at 1111 Faussett Road, in Howell, Michigan. Affiant has also personally interviewed William Harp who resides at 3780 Clyde Road, Howell, Michigan 48843. Both Van Patten and Harp are past associates and acquaintances of the suspects. More specifically, Van Patten and Harp have repeatedly been at the above premises to be searched over the past several years.

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[67]T Vol I. 40.

Defendants argue that this is fatal to a finding of probable cause. The Prosecutor disagrees, arguing all that is required is information in the affidavit from which the magistrate can reasonably conclude that the name informant spoke from personal knowledge, relying upon MCL 780.653; MSA 28.1259[3], which provides:

> Sec. 3 The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
>
> (a) If the person is names, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.
>
> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

*People v. Harris,* 191 Mich App 422; 479 NW2d 6 (1991), decided after a change in the statutory language, provides that information contained in an affidavit is adequate where each named individual is alleged to have spoken form personal knowledge. *Id.* 425; MCL 780.653; MSA 28.1259[3]. While the statute provides that allegations that a named informant spoke with personal

knowledge is sufficient *Harris,* and all subsequently decided cases which discuss named informants also place emphasis upon the credibility of the information supplied by the named informant based upon some source independent of the informant's personal knowledge.

**ISSUE 4**

**4. Did the officers who executed the search warrant comply with the requirements of MCL 780.656; MSA 28.1259(6) prior to their entry into the defendant's gun vault?**

MCL 780.656; MSA 28.1259(6), the "knock and announce" statute provides:

> Sec. 6. The officer to whom a warrant is directed, or any person assisting him, may break and outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant.

Defendants argue that Perry violated this statute by failing to contact either Mr. or Mrs. Wolfe prior to breaking the lock which held the bookshelves together in front of the gun vault's door. When confronted with the gun vault

door, Perry asked Mrs. Wolfe for the combination to the gun vault, without explaining his authority or purpose for seeking access. In a similar fashion Perry sought the combination from Mr. Wolfe. Defendant's argue that Wolfe did not voluntarily waive his objection to police entry into the vault. Pursuant to *People v. Poldori,* 190 Mich app 673, 677-678; 476 NW2d 482 (1991); *People v. Asher,* 203 Mich App 621, 624; 513 NW2d 144 (1994). Defendants request that all evidence obtained from the search of the vault conducted in violation of the 'knock and announce' statute be suppressed.

Defendants note that Perry testified that he had received no information prior to the search that the gun vault contained any stolen material, or that it contained any evidence connecting Defendants to any crime. It is Defendants' position that Perry sought to gain entrance to the gun vault in order to look for, and seize, any weapons that did not "look right," so that he could then allow Special Agents Evans of the ATF to examine those weapons, and seek to charge Defendant with whatever federal charges would result from the seizure.

Detective Perry testified that the gun vault was not readily observable and although he knew of its existence, there was no mention of it in the affidavit.[68] His first undertaking upon entry into the home was to find a gain

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[68]T Vol I. p 60.

access to the vault.[69] In order to expose the vault, Perry had to dismantle something to open the bookcase and reveal the steel door.[70] Perry initially testified that he could smell marijuana before entering the vault.[71] He explained this to mean that he could smell marijuana after moving the bookcase and after obtaining the combination to the steel door.[72] Perry testified that he commented about the smell to the other officers who were present, suggesting that it might have been Detective Westendorf.[73] However, Detective Westendorf testified that the vault was already opened when he arrived downstairs, and that he did not have that conversation with Detective Perry.[74] Likewise, Detectives Moor and Swackhammer testified that they were not present when the vault was opened and did not smell marijuana before it was opened.[75] Detective Luzod testified that he assisted Perry in the search for the hidden

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[69]T Vol VII. p 22-24.

[70]T Vol II. p 5-6.

[71]T Vol I. p 62.

[72]T Vol I. p 65-70; Vol II. p 40.

[73]T Vol. p 62-63.

[74]T Vol IV. p 126, 129-130.

[75]T Vol V. p 10, 21;

gun vault, that he was present when the bookshelves were opened to reveal the locked steel door, that Perry never mentioned smelling marijuana, and that he did not smell marijuana himself.[76] Luzod further testified that after the bookcase was opened he received an assignment from Perry to search the rest of the house.[77] Perry testified that he did not know that the marijuana was there until after the vault was open.[78] The Court does not believe that Perry smelled marijuana prior to the time that the vault door was opened.

According to his testimony, Perry's reason for entering the vault was not for the marijuana or guns, but to look for stolen material, not hay, but evidence or building materials.[79] Perry acknowledged that there was no mention that a golf cart was in the house or vault,[80] yet offered that it was possible to get a golf cart through the basement door-wall if it were turned sideways.[81]

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[76]T Vol VII. p 22-27, 75-76.

[77]T Vol VII. p 28.

[78]T Vol II. p 41.

[79]T Vol I. p 77-79.

[80]T Vol III. p 29-30.

[81]T Vol III. p 199.

Throughout the hearing, a variety of reasons for seizing the guns were espoused. Perry acknowledged that they did not have any authority to search for or seize guns under the search warrant. Further, that there was no security issue as to the weapons in the vault.[82] Perry testified that the guns in the vault were seized solely because of the marijuana. Based upon the unsuspected discovery of the marijuana, Perry called the Prosecutor's office to determine if a second search warrant was required.[83] Perry had no authority, either under the warrant or otherwise, to enter the gun vault.

**ISSUE 5**

**5. Can the seizure of items upon the Defendant's premises, in his home, or from within his gun vault, be justified under the "plain view" exception to a valid search and seizures?**

Defendants recognize that the arguments heretofore presented do not exclude items seized incident to Defendant's arrest. *Chimel v. California,* 345 U.s 752; 89 S Ct 2034; 23 L Ed2d 685 (1969). Nor would these

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[82]T Vol I. p 80-86.

[83]T Vol I. p 87-88.

arguments exclude items that were observed in plain view as the entry team made its "protective sweep' of Defendants' home. *Maryland v. Buie,* 494 U.S. 325; 110 S Ct 1093; 108 L Ed2d 276 (1990).

There are two prerequisites to a seizure under the plain view doctrine, (1) that the officer had a right to be where he/she saw the object seized; and (2) that it was immediately apparent to the officer that the object he/she saw from his/her lawful vantage point was incriminating. *Horton v. California,* 496 U.S. 128; 110 S Ct 2301; 110 L Ed2d 112 (1990); *People v. Dugan,* 102 Mich App 497, 503-504; 302 NW2d 209 (1980), *lev den,* 411 Mich 989 (1981); *cert den,* 455 U.S. 927, 102 S Ct 1292; 71 L Ed2d 471 (1982).

Defendants argue that because of the foregoing arguments, the search warrant was not valid and therefore nothing could be seized from Defendants' premises as the officers were never in a place where they had a right to be.

This Court has previously set forth the basis for its opinion that the officers were not justified in being int he residence under the search warrant. Accordingly, items seized within the premises whether pursuant to the search warrant, or under the plain view doctrine (barring what may have been seized incident to a lawful arrest) must be suppressed.

**CONCLUSION**

Evidence seized pursuant to a search warrant that was secured partially on the basis of tainted information and partially on the basis of lawfully obtained information from independent sources is admissible if, after redaction of the tainted information, the remaining allegations would have established probable cause and would have justified issuance of a search warrant encompassing the seized evidence. *People v. Melotik*, 221 Mich App 190, 201; 561 NW2d 453 (1997). The search warrant in this case would not have resulted in the seizure of the marijuana but for the tainted information, and the over breadth of the warrant. Accordingly, the seized marijuana is suppressed.

**IT IS SO ORDERED.**

June 19, 1998
Date

/s/ Daniel A. Burress
Daniel A. Burress
Circuit Judge

**STATE OF MICHIGAN**
**COURT OF APPEALS**

**PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff-Appellant/Cross-Appellee,***
**CASE NO. 97-9961 FH**
**No. 213312**
**Livingston Circuit Court**

**vs.**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant-Appellee/Cross-Appellant.***

**PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff-Appellant,***
**CASE NO. 97-9962 FH**
**No. 213313**
**Livingston Circuit Court**

**vs.**

**MARIE ELIZABETH WOLFE,**
***Defendant-Appellee.***

**UNPUBLISHED**
**September 17, 1999**

**Before: Gribbs, P.J., and Kelly and Hood, JJ.**

State of Michigan,
Court of Appeals
Filed 9/17/99

***PER CURIAM.***

Defendants were charged with the unlawful manufacture of marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii). They moved to suppress the evidence of the marijuana and, following a hearing, the trial court ordered the marijuana suppressed.[1] Plaintiff appeals as of right, and we affirm.

While this Court reviews de novo a trial court's ultimate decision with regard to a motion to suppress evidence, it may set aside a trial court's findings of fact only upon a showing of clear error. *People v. Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998); MCR 2.613(C). In this case, we find no clear error in the trial court's findings, and therefore cannot justify a reversal.

After the evidentiary hearing, which took place over a period of eight days, the trial judge issued a comprehensive and cogent, thirty-nine page written opinion. We adopt and incorporate this opinion as our own. In the opinion, the trial court found, inter alia, that the bulk of the testimony concerning the information in the affidavit for the search warrant was totally unbelievable, and in some cases,

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[1]Although the trial court only suppressed the marijuana, the prosecution concluded that it could not proceed on the charge, and the entire case against defendants was dismissed.

blatantly false.[2] The trial court's finding in this regard are supported by the record.

The trial court redacted the affidavit in support of the search warrant to eliminate the false statements and statements made with disregard for the truth. See *People v. Melotik*, 221 Mich App 190, 200-201; 561 NW 2d 453 (1997). It then considered the affidavit and found that no factual allegations remained which would allow a conclusion that any admissible or relevant records or evidence of crimes could be found in defendants' residence. Our review of the record and affidavit leads to the same conclusion that there was no fair probability that contraband or evidence of any particular crime would be found in defendants' residence. Therefore, suppression was warranted.

In making our ruling, we acknowledge that there were sufficient facts to establish probable cause to search a new pole barn and a gray airplane hangar which were on defendants' property. However, there was no probable cause to search the residence. For this reason, the prosecutor cannot meritoriously argue that the marijuana

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[2]The marijuana at issue was found in a locked gun vault, which was behind some false shelving in defendants' residence. The prosecution witnesses agreed that no odor of marijuana could be detected when the vault was closed. Neither the affidavit nor the search warrant mention the manufacture of possession of marijuana.

could be properly seized because the police were lawfully in a position from which they could view it. See *People v. Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996).

Defendant Ronald N. Wolfe raises four arguments in his cross-appeal. In light of our resolution of plaintiff's appeal, we need not address any of defendant's three arguments with regard to the legality of the search of his residence. Defendant's remaining argument, concerning evidence seized in a January 16, 1997 search, is not properly before us because the subject of the pending appeal is the trial court's order suppressing evidence seized in the December 23, 1996 search.

**Affirmed.**

/s/ Michael J. Kelly

/s/ Harold Hood

**STATE OF MICHIGAN**
**COURT OF APPEALS**

**PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff-Appellant/Cross-Appellee,***
**CASE NO. 97-9961 FH**

**vs.**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant-Appellee/Cross-Appellant.***

**PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff-Appellant,***
**CASE NO. 97-9962 FH**

**vs.**

**MARIE ELIZABETH WOLFE,**
***Defendant-Appellee.***

**Before:** **Gribbs, P.J., and Kelly and Hood, JJ.**
**GRIBBS, J.** ***(dissenting).***

I respectfully dissent. I would reverse the trial court's grant of defendants' motion to suppress.

This case involves a search of defendants' property that was conducted on December 23, 1996. Detective Alan Perry of the Livingston County Sheriff's Department received information from informants William Harp and Harold Van Patten implicating defendants in five different theft offenses; theft of hay bales, theft of building materials,

theft of roofing materials, theft of golf carts, and theft of horses. In addition, Perry received information that defendant may have engaged insurance fraud. Perry presented the information he received to an assistant prosecutor, who drafted an affidavit for each warrant . On December 23, 1996, the affidavit was presented to Judge Michael Hegarty, who signed a search warrant authorized the search of defendants' entire premises, including the house. The items to be seized in the search included documents relating to ownership or occupancy of the house, insurance records, bales of hay, golf carts, records relating to building materials, shingle and building material samples, photographs, records relating to the purchase, ownership or registration of firearms, records relating to the possession, ownership or registration of vehicles, and records of evidence relating to horse ownership, sales or veterinary treatment. The officers knew, from information received from the informants, that there was a gun vault hidden behind shelves in the basement. During the search of defendants' house, the officers found the set of false shelves in the basement which covered the door to a gun vault. Police obtained the combination to the lock on the vault, then opened the door and entered, finding numerous guns and a marijuana growing operation.

At the hearing on defendants' motions to suppress, a number of inconsistencies concerning the issuance and content of the warrant were brought to light. The trial court

issued an opinion on June 19, 1998, in which it found that the affidavit contained a number of statements made with reckless disregard for the truth. Even redacting these statements, however, the trial court found that the affidavit gave sufficient facts to show probable cause to believe that defendant Ronald Wolfe had committed all offenses alleged, except for insurance fraud. In addition, the trial court concluded that although it did not believe Perry's testimony about being sworn by Judge Hegarty in person rather than by telephone, it found that Perry had sworn to the affidavit, relying on Judge Hegarty's testimony about his strict practice in swearing individuals. Although the court found probable cause to believe that most of the offenses alleged in the affidavit had been committed, it found no probable cause in the affidavit to search in the house for any of the items listed. Accordingly, it concluded that the marijuana must be suppressed.

I would find that the trial court erred in granting the motion to suppress. A search warrant may issue only on a showing of probable cause, supported by oath or affirmation. *People v. Sloan,* 450 Mich 160, 166-167; 538 NW2d 380 (1995). Probable cause exists when the facts and circumstances would justify a reasonable person in concluding that there is a fair probability that identifiable objects will be found at the present time in a certain identifiable place. *People v. Russo,* 439 Mich 584, 605, 607-608; 487 NW2d 698 (1992); *People v. Dowdy,* 211

Mich App 562, 568; 536 NW2d 794 (1995). The affidavit must contain facts within the knowledge of the affiant, as distinguished from mere conclusions or beliefs. *Sloan, supra,* 169-170, citing *People v. Rosborough,* 387 Mich 183, 199; 195 NW2d 255 (1972). The magistrate must then decide whether to issue a warrant based on the contents of the affidavit. *Id.;* MCL 780.653; MSA 28.1259(3).

In reviewing a magistrate's decision to issue a search warrant, the warrant and underlying affidavit are to be read in a common sense and realistic manner. *Russo, supra,* 604. A magistrate's determination of probable cause should be given great deference by the reviewing court. *Illinois v. Gates,* 462 U.S. 213, 236-237; 103 S Ct 2317; 76 L Ed 2d 527 (1983); *Russo, supra,* 603-604. Courts should not invalidate warrants by interpreting affidavits in a hyper technical, rather than a common sense manner. *Id.* If the reviewing court concludes that an affiant knowingly and intentionally, or with reckless disregard for the truth, either inserted false material or omitted material information from the affidavit, the reviewing court may redact the improper information and determine whether probable cause exists based on the remaining information. See *Franks v. Delaware,* 438 U.S. 154, 171-172; 98 S Ct 2674; 57 L Ed 2d 667 (1978); *People v. Stumpf,* 196 Mich App 218, 224; 492 NW2d 795 (1992).

Having reviewed the record, I would find that there was probable cause to support the claim of insurance fraud.

The finding of insurance fraud is a pivotal threshold question in this case. If there was probable cause to issue a warrant on this basis, which essentially involves a "paper" crime, it is axiomatic that there was a fair probability that any records relating to defendant's involvement in insurance fraud would be found in defendants' residence. Once lawfully inside the residence, common sense dictates that the most likely place for the officers to search for records of unlawful activity would be in the secret gun vault.

The affidavit related what Perry had learned directly from named informants, Harp, Van Patten, and Van Patten's brother. Harp and Van Patten knew defendant and had been to defendants' house many times. Harp told Perry that defendant dropped off a shipment of windows at his house and asked that he store them. Within a month, defendants' son began delivering these windows to the residence defendants were constructing. Van Patten, who worked on the house, said the deliveries were made piecemeal although the house was framed in and ready for the windows to be installed. Defendant told Van Patten's brother that he made an insurance claim, reporting the windows stolen, and received money for the windows.

The informants here were named and spoke with personal knowledge of the information, which forms an appropriate basis for probable cause. MCL 780.653; MSA 28.1259(3). The named informants' information in this case was quite detailed, some of it was confirmed by police

investigation, and the warrant was properly sworn. Even redacting those statements in the affidavit allegedly made with reckless disregard for the truth, I believe probable cause exists to support the search, and that the trial court erred in finding the magistrate lacked probable cause to ace the warrant. Further, once the police were conducting a valid search of defendants' residence, I would find that the marijuana, unexpectedly discovered in plain view during their lawful search, was also admissible.

I would also find that the affidavit gave ample indication that evidence relating to the various thefts could be found in the house. The windows that were the subject of the insurance fraud investigation were allegedly installed in defendants' residence, and the warrant also authorized a search for insurance and ownership records for the allegedly stolen items, proof of ownership for any weapons found, records concerning sales or veterinary care for the stolen animals, and photographs. It was reasonable to believe that the paper trail of defendants' alleged crimes would be found in defendants' residence, and the hidden gun vault was the most likely place to search for them. The warrant also contained an allegation that defendant and his son had guns in their possession during the hay theft and that defendant frequently carried a gun on his person. Because defendant was a licensed gun dealer who would likely have guns on the premises, and because he was alleged to have used the guns unlawfully, common sense dictates that the police

would verify the location and legality of any weapons found during the search.

I would conclude that the evidence was improperly suppressed and reverse the decision of the trial court.

/s/ Roman S. Gribbs

# ORDER

**Entered: January 21, 2000**

**PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff-Appellant,***
**CASE NO. 97-9961 FH**
**SC: 115607 COA: 213312**
**Livingston Circuit Court**

**vs.**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant-Appellee.***

Michigan Supreme Court
Filed 1/21/00

On order of the Court, the application for leave to appeal from the September 17, 1999 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 21, 2000 /s/ Corbin R. Davis
Corbin R. Davis, Clerk

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**UNITED STATES OF AMERICA,**
***Plaintiff-Appellee,***
**CASE NO. 99-1696**

**vs.**

**U.S. DISTRICT JUDGE**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant-Appellant.***

6th Circuit
Court of Appeals
Filed 10/11/00
Leonard Green,
Clerk

**On Appeal from the United States District Court for the Eastern District of Michigan**

**BEFORE: GUY AND MOORE, Circuit Judges; and DOWD, District Judge.***

**RALPH B. GUY, JR., Circuit Judge.** Defendant, Ronald Wolfe, Sr., entered a conditional plea of guilty to one count of possession of an unregistered silencer and reserved the right to appeal the district court's refusal to suppress evidence seized from his residence on December 23, 1996. The district court rejected defendant's various

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***The Honorable David D. Dowd, Jr.**, United States District Court for the Northern District of Ohio, sitting by designation.

challenges to the state search warrant and the seizure of evidence. Without reasserting all of his challenges, defendant argues on appeal that: (1) the affidavit did not support a finding of probable cause to search *his* residence in addition to the outbuildings; (2) the warrant did not describe the property to be seized with sufficient particularity; (3) the state officers conducted the search in an overly broad manner; (4) the officers were not authorized to seize firearms from the hidden vault in the basement under the plain view exception to the warrant requirement; and (5) the good faith doctrine did not permit the introduction of evidence seized from the basement vault. After careful review of the record and the arguments presented on appeal, we find no error and affirm.[1]

## I.

Defendant was charged with 22 offenses, including possession of a number of unregistered machine guns, pen guns, and silencers; possession of a short-barreled rifle; possession of a stolen firearm; failure to record firearms transactions; and unlawfully manufacturing marijuana.

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[1]A full presentation of the facts can be found in United States v. Wolfe, 22 F. Supp.2d 627 (E.D. Mich. 1998) (Wolfe I), and United States v. Wolfe, 32 F. Supp.2d 945 E.D. Mich. 1999) (Wolfe II).

During the execution of a state search warrant on December 23, 1996, officers seized from a gun vault located in the basement of defendant's residence both the firearms that were the subject of these charges and evidence of a marijuana growing operation. The Search warrant was issued as part of an investigation into defendant's participation in larceny and fraud crimes.

The six-page affidavit supporting the warrant was prepared by Daniel Garber, Chief Assistant Prosecutor for Livingston County Sheriff's Department. Perry had investigated the theft of two wagon loads of baled hay in August 1996; the theft of building materials, including a large amount of OSB board, from a construction site on September 15, 1996; the theft of roofing materials, including dark brown shingles, ice guard, and felt, from another construction site on September 28, 1996; a fraudulent insurance claim for a shipment of new residential windows that were installed in defendant's residence during the mid to late summer of 1994; the theft of two "Club Car" golf carts from a golf course in January 1995; and the theft of two horses from a residence about four miles from defendant's premises on May 23, 1996.

The information Perry provided in the affidavit was primarily based upon interviews with Harold Van Patten and William Harp, who were past associates and acquaintances of defendant and had repeatedly been at the premises to be searched. Without reciting all of the

information provided, we observed the following. Van Patten, who resided for a time in the barn on defendant's premises, said he was awakened after midnight one night be defendant. He then accompanied defendant, defendant's son, Ronald Wolfe, Jr., and another man to steal two wagon loads of baled hay from a field. The wagons were hitched to two pickup trucks and the baled hay was stacked in an airplane hangar on defendant's premises. Van Patten said the wagons were driven through an area of pine trees near the hangar. The wagons were later found abandoned along a road with pine boughs and cones in them.

Van Patten also said that defendant paid him to construct a pole barn on the premises and that defendant provided materials matching the description of building materials stolen from the construction site of a new home on Byron Road. Van Patten indicated that defendant, defendant's sons, and Richard Culbert admitted that those materials had been stolen from the construction site.[2] As

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[2]Van Patten testified that although defendant did not admit the materials were stolen, he told Van Patten that Junior and Richard got them from somewhere "off old 23." Van Patten clarified that it was Junior and Richard who actually admitted stealing the materials from somewhere "off old 23." The district court rejected the claim that this and other misstatements in the affidavit invalidated the warrant. Defendant does not challenge that finding on appeal.

for the stolen roofing materials, Van Patten indicated that he saw the materials being loaded onto the roof at a construction site located about a half mile from defendant's premises and later noticed that they had disappeared from the site. In the meantime, defendant delivered roofing materials to the pole barn being constructed on his premises, including shingles that matched the description of the stolen shingles and were damaged in a manner consistent with having been thrown from a roof.

Van Patten also told Perry that he personally observed and cared for two horses on defendant's premises for about three weeks beginning in mid-May 1996. Two horses were stolen on May 23, 1996, from a farm about four miles from defendant's premises. Given a photograph of one of the horses, Van Patten positively identified it as having been one of the two horses kept in defendant's barn. Van Patten also stated that the second horse in the barn fit the description of the other stolen horse. The horses were removed on a Saturday, which is the day that horse auctions are held at the Michigan Horse Action in Fenton, Michigan.

William Harp indicated that he accompanied defendant and his son to the Oak Pointe Golf Course. Harp saw the Wolfes load two cream-colored "Club Car" golf carts onto a trailer hitched to a Suburban owned by Harp's wife. Defendant kept one golf cart and gave the other to Harp. The golf cart in Harp's possession bore the serial number of one of the two stolen carts. Van Patten has a

picture of a golf cart parked near defendant's log residence. A state police officer also indicated that he had seen golf carts on the premises while there on an unrelated matter.

Finally, Harp indicated that defendant asked him to store a shipment of new residential windows at his home, which he did. Four to six weeks later, defendant's son began delivering windows by pickup truck to defendant's residence. Van Patten, who was assisting with construction of the residence, remembered that defendant's son brought the windows in a piecemeal fashion. Harold Van Patten's brother, Scott Van Patten, told Perry that defendant said he made an insurance claim and was paid for his stolen windows. The affidavit also stated that witnesses, including Harold Van Patten and William Harp, observed that defendant commonly carried a firearm and saw numerous firearms on the premises to be searched. Perry determined that defendant had registered firearms with the county and had a federal firearms dealer license.

The warrant, issued by a state district judge, authorized a search of the defendant's entire premises in Howell, Michigan, including:

> the residence and outbuildings commonly referred to as 5753 fisher Road; said premises include a multi story log construction residence located on the west side of Fisher Road in Section 1 of Howell Township, Livingston County, a gray barn with a brown roof having living quarters in the upper story

> that is located South of the log constructed residence, a new pole barn with a dark shingled roof and OSB siding located southeast of the log constructed residence and a gray airplane hangar structure with a steel roof located north/northeast of the log constructed residence.

*Wolfe I,* 22 F. Supp. 2d at 630. The warrant specifically described the property to be searched for and seized as follows:

> Documents or evidence indicative of the ownership or occupancy of the above premises; insurance records including contracts, claim forms and payment forms; bales of hay; golf carts; records relating to building materials for the structures on the premises; shingle samples; building material samples; photographs; records relating to the purchase, ownership or registration of firearms; records relating to the possession, ownership or registration of vehicles[;] records or evidence relating to horse ownership, sales or veterinary treatment.

*Id.* When officers from the sheriff's department and the state police arrived to execute the warrant, defendant was arrested for larceny over $100 and transported to the Livingston County Jail.

Perry had been told that defendant had a hidden vault in the basement and numerous firearms on the premises. At the time the warrant was executed, Perry

knew defendant was a federally licensed firearms dealer, but did not know what class of firearms he was licensed to sell. Perry acknowledged that the affidavit did not establish probable cause to search for firearms on defendant's premises. He admitted that he intended to look for weapons, but not to seize them under the warrant. In the basement, Perry found the locked vault concealed behind moveable bookshelves. When defendant's wife would not assist in opening the vault, Perry contacted the Jail and defendant provided the combination to the vault.[3]

Upon opening the vault, Perry found a loaded assault rifle hanging on the door; scores of firearms, including assault weapons, rifles, and pistols; and a marijuana growing operation with seventeen, two-to-three-foot high marijuana plants. Many of the firearms were loaded and displayed on a peg board on the wall. Perry contacted Garber, the prosecutor, for advice and was told he should seize all of the firearms in the house because of their proximity to the marijuana. Perry, was able to find registration records for only a few of the weapons and did

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[3]Defendant states that he was coerced into giving the combination after his request to speak to counsel was denied. Defendant was told that if he did not provide the combination, the vault would be forcibly opened. Although Perry did not deny this, it is irrelevant to the issues on appeal because the government did not claim that defendant consented to a search of the vault.

not find any records which licensed firearm dealers are required to keep. Defendant's firearms business was located more than 50 miles away in Detroit, Michigan. The seized firearms were later examined by the Federal Bureau of Alcohol, Tobacco and Firearms (ATF), which reported that they included at least 13 unregistered automatic weapons; one unregistered saw-off rifle; two unregistered pen guns; three unregistered silencers; and two stolen firearms. Officers also seized bales of hay, golf carts, OSB board, pneumatic staplers, and various documents and records found in the residence.[4]

Several criminal cases were brought against Ronald Wolfe, Sr., and his wife in the Livingston County Circuit Court, including charges of manufacturing marijuana with intent to deliver, in violation of Mich. Comp. Laws Ann. § 333.7401(2)(d)(iii). The state court judge heard testimony from a number of witnesses and issued a lengthy written decision on June 19, 1998, suppressing the evidence of marijuana seized from the vault. The state marijuana charge was then dismissed.

In federal court, defendant was indicted on the firearms offenses and filed a similar motion to suppress evidence seized from the vault. During the evidentiary

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[4]About a dozen other weapons found elsewhere in the house were seized, but were not the subject of any of the charges.

hearing, the parties agreed to the admission of certain testimony from the state proceedings and defendant provided the court with a copy of the state court judge's decision. On September 1, 1998, the federal court rejected defendant's various challenges and denied defendant's motion to suppress the fruits of the state search warrant. *See Wolfe*, 22 F. Supp.2d at 631.

In the wake of this court's decision in *United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998), the case was presented to a new grand jury and the First Superseding Indictment was returned against defendant on August 19, 1998. The superseding indictment was identical to the original indictment, except that it added a charge of manufacturing marijuana. Defendant filed several motions renewing his challenges to the search and seizure and raising additional claims, which were denied on January 13, 1999. *See Wolfe II*, 32 f. Supp.2d at 947-49.[5]

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[5]After the completion of the briefing of this appeal, defendant filed a motion urging that we adopt the state court's decision suppressing the evidence seized from his residence and give its final judgment "full faith and credit." *See* 28 U.S.C. § 1738. Defendant argues that collateral estoppel should have barred the government from relitigating the validity of the seizure of evidence from his residence. This issue is not properly before us, as defendant failed to raise it either before the district court or in his opening brief on appeal. Were we to consider the issue on the merits, we would find that collateral estoppel does not

Defendant promptly entered a conditional plea of guilty to one count of possession of an unregistered silencer and was sentenced to 41 months' imprisonment, to be followed by a term of supervised release. This timely appeal followed.

## II.

In reviewing the denial of a motion to suppress evidence, we review the district court's factual findings for clear error and its legal conclusions *de novo*. *See United States v. Jones*, 159 F.3d 969, 973 (6th Cir. 1998); *United States v. Leake*, 998 F.2d 1359, 1362 (6th Cir. 1993). We address only those findings that defendant specifically challenges on appeal.

### A. Probable Cause

Under the totality of the circumstances approach adopted in *Illinois v. Gates*, 462 U.S. 213, 238 (1983), "[t]he task of the issuing magistrate is simply to make a

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preclude the United States from using evidence in a federal prosecution that was suppressed in the state court prosecution. *See United States v. Davis*, 906 F.2d 829 (2d Cir. 1990); *United States v. McManus*, 719 F.2d 1395, 1397 (6th Cir. 1983).

practical, common sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." A reviewing court must not examine the sufficiency of an affidavit *de novo,* but must accord the magistrate's decision "great deference." *Id.* at 236. *See also United States v. Allen,* 211 F.3d 970, 973 (6th Cir. 2000) (en banc).

Defendant raised a number of challenges to the probable cause determination, which were rejected by the district court. *See Wolfe I,* 22 F.Supp.2d at 633-40. Conceding that there was probable cause to search the outbuildings on the premises, defendant argues that the affidavit failed to set forth probable cause to believe evidence of a crime would be found in defendant's log residence located on the premises. In essence, defendant argues that the affidavit must demonstrate probable cause with respect to each structure on the premises.

This court recently rejected a similar contention in *United States v. Bennett,* 170 F.3d 632,638-39 (6th Cir. 1999). There, the defendant argued that although there was probable cause to search his residence for evidence of drug trafficking, the affidavit contained no allegation that evidence of illegal activity would be found in an outbuilding located on the same property. This court held that "there is no need to search for evidence to link the outbuilding to the allegations in the affidavit; the shop

building and residence are sufficiently connected because they are both within the curtilage of the defendant's property." *Id.* at 639. Similarly, we find that defendant's barn, hangar, and pole barn were sufficiently connected to defendant's residence that the probable cause to search the premises included defendant's residence. *See also United States v. Roberts,* 747 F.2d 537, 545 (6th Cir. 1984) (defendant was in control of entire premises, and probable cause to search garage extended to house).

Further, there is no requirement that there be prior observation of all items listed in a search warrant in order to have probable cause to search a place for them. *See Jones,* 159 F.3d at 974 (citations omitted). *See also United States v. Hargus,* 128 F.3d 1358, 1362 (10th Cir. 1997). The warrant specifically listed documents and records relating to: (1) building materials for the structures on the premises; (2) horse ownership, sale, or veterinary treatments; (3) insurance contracts, claim forms, and payment forms; and (4) vehicle possession, ownership, or registration. Given the nexus between the premises to be searched and the offenses being investigated, there was at least a fair probability that incriminating documents or records would be found in defendant's residence. *See United States v. Blakeney,* 942 F.2d 1001, 1025 (6th Cir. 1991) (facts created likelihood that evidence of robbery would be concealed in accessible, yet private location such as defendant's residence).

In addition, although defendant argues that the officers knew he lived on the property, we find that the search for documents indicating ownership or occupancy of the premises was properly authorized by the warrant. Since some of the stolen property was allegedly installed or used on the property, defendant's ownership or control of the property would be incriminating evidence and the issuing judge had probable cause to believe such evidence would be found in the residence.[6]

**B. Particularity**

Defendant argues next that the state search warrant failed to describe the items to be searched for with sufficient particularity and resulted in an over broad search warrant. We review *de novo* the district court's conclusion about whether a warrant is over broad. *See United States v. Ford,* 184 F.3d 566, 575 (6th Cir. 1999), *cert. denied,* 120 S. Ct. 1175 (2000). Although the district court

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[6]The district court further found the *even if* the affidavit did not establish probable cause to search defendant's residence, the search would still be valid under the good faith exception of *United States v. Leon,* 468 U.S. 897 (1984). *See Wolfe I,* 22 F. Supp.2d at 640-41. Since we have found that there was probable cause to support the warrant in this case, we need not address defendant's challenges to the district court's conclusion in this regard.

declined to specifically address this argument because it was not raised in the defendant's earlier challenges to the original indictment, the court reaffirmed its conclusion that the warrant was valid. *See Wolfe Ii,* 32 F. Supp.2d at 948. Defendant argued that the warrant failed to particularize any of the eleven generic types of evidence to be seized.

"General search warrants which failed to particularly describe the things to be searched for and seized 'create a danger of unlimited discretion in the executing officer's determination of what is subject to seizure and a danger that items will be seized when the warrant refers to other items.'" *United States v. Ables,* 167 F.3d 1021, 1033 (6th Cir.), *cert. denied,* 527 U.S. 1027 (1999) (quoting *United States v. Savoca,* 761 F.2d 292, 298-99 (6th Cir. 1985)). The degree of specificity required will vary depending upon the crime involved and the items sought. *See United States v. Henson,* 848 F.2d 1374, 1383 (6th Cir. 1988). "Thus a description is valid if it is as specific as the circumstances and the nature of the activity under investigation permit." *Id.*(quoting *United States v. Blum,* 753 F.2d 999, 1001 (11th Cir. 1985)).

Defendant has not articulated in what way the warrant failed to particularly describe the items to be searched for and seized. In the arguments presented to the district court, defendant argued that the officers' discretion could have been limited by specifying, for example, bales of hay tied with a unique loop, a particular color of shingle,

or including only documents or records relating to *stolen* horses, or certain kinds of building materials. Given the multiple larceny and fraud offenses being investigated and the information available at the time, we find that the warrant sufficiently described the items to be searched for and seized. Moreover, even when a warrant is found to be overly broad, the remedy is to sever the overly broad portions from those that are sufficiently particular. *See Ford,* 184 F.3d at 578. Defendant has not shown that the officers' presence in the vault from which the firearms at issue were seized was the result of an overly broad description of items to be seized.

**C. General Search**

Defendant's amended and supplemental motion to suppress evidence of the firearms and marijuana, filed after the superseding indictment was returned, specifically argued that the execution of the warrant so grossly exceeded its scope that all the evidence seized should be suppressed. In that motion, defendant asked the court to reopen the record or permit him to supplement the record with testimony from the state court proceedings. In a reply brief, which was stricken by the district court, defendant summarized that state court testimony that formed the basis for this claim. The district court ruled that defendant would not be permitted to relitigate issues regarding the validity of the

search warrant and its execution. *See Wolfe II,* 32 F. Supp.2d at 948-49. While the district court did not abuse its discretion in determining that this claim was not timely raised, the record is adequate to permit us to review the issue.

"A search does not become invalid merely because some items not covered by a warrant are seized." *Henson,* 848 F.2d at 1383 (citing *United States v. Lambert,* 771 F.2d 83 (6th Cir. 1985)). It is the flagrant disregard for the limitations of a search warrant that may make an otherwise valid search an impermissible general search requiring the suppression of all the evidence. *See Lambert,* 771 F.2d at 93. "When law enforcement officers grossly exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant." *United States v. Medlin,* 842 F.2d 1194, 1199 (10th Cir. 1988).

Defendant relies upon testimony that the officers seized boxes of receipts, records, and photographs, without examining their contents to determine which items, if any, were to be seized under the warrant. Several audio tapes were also seized without being listened to, including one labeled "I love you." Officers seized several police uniforms and a badge with defendant's name on it, knowing that defendant had been convicted of impersonating a police

officer from that department. Officers looked into the vehicles on the premises and seized a canister of mace-like gas. Defendant complains that officers seized hay, OSB board, and a second golf cart, even though they could not be identified as stolen. Also, the serial numbers on some power tools were checked and stolen pneumatic staplers were seized.

We find that this case is not comparable to *Medlin,* in which officers grossly exceeded the scope of the warrant by seizing 677 items when the warrant only authorized a search for firearms. Nor was the search converted to an impermissible general search by the fact that Perry expected to find evidence of firearms, including automatic weapons, in defendant's residence. In this case, neither the seizure of documents and records without sorting them, nor the thorough search of the premises under the warrant, so far exceeded the scope of the warrant as to constitute a flagrant disregard of its limitations. *See, e.g., United States v. Frost,* 125 F.3d 346, 388 (6th Cir. 1997); *Hargus,* 128 F.3d at 1363.

**D. Plain View**

As the government conceded, the warrant did not authorize the police to search for and seize either firearms or any evidence or marijuana manufacturing. Nonetheless, the district court found that the seizure to these items from

the basement vault was valid under the "plain view" exception to the warrant requirement. *See Wolfe I,* 22 F.Supp.2d at 641-45. For this exception to apply, the evidence must be (1) in plain view; (2) of a character that is immediately incriminating; (3) viewed by an officer lawfully located in a place from which it could be seen; and (4) seized by an officer who has a lawful right of access to the evidence itself. *See United States v. Jenkins,* 124 F.3d 768, 774 (6th Cir. 1997); *United States v. Calloway,* 116 F.3d 1129, 1133 (6th Cir. 1997); *United States v. Roark,* 36 F.3d 14, 18 (6th Cir. 1984).

While defendant makes much of the fact that Perry intended to look for and expected to find firearms during the search, the Supreme Court has held that inadvertent discovery of evidence is not required for the plain view exception to apply. *See United States v. Bradshaw,* 102 F.3d 204, 211 (6th Cir. 1996) (citing *Horton v. California,* 496 U.S. 128, 136-37 (1990)0. Accordingly, defendant argues that the plain view exception did not apply because (1) the officers were not lawfully present in the gun vault when the firearms were observed; and (2) the incriminating character of those firearms was not immediately apparent.

We have already found, however, that the officers were authorized to search defendant's residence pursuant to the warrant. Further, the officers' authority to search extended to the hidden vault located in the basement without regard for whether it was locked. Upon opening

the vault, Perry observed a small room containing an obvious marijuana growing operation and a large number of weapons. We are satisfied that the officers were lawfully present in the gun vault and that the firearms were in plain view.

Defendant does not deny that the incriminating nature of the marijuana and associated evidence was immediately apparent when the officers opened the vault. The only issue is whether the incriminating character of the firearms and silencers was immediately apparent. This does not require a "high degree of certainty as to the incriminatory character of evidence , "but rather, requires only *"probable cause to associate the property with criminal activity." Texas v. Brown,* 460 U.S. 730, 741-42 (1983) (quoting *Payton v. New York,* 445 U.S. 573, 587 (1980)). *See also Calloway,* 116 F.3d at 1133. As a flexible common-sense standard, there is probable cause when the facts available would warrant a man of reasonable caution to believe that certain items may be contraband, stolen property, or useful as evidence of a crime. *See Brown,* 460 U.S. at 742.

Here, the officers saw in plain view scores of firearms, including automatic weapons, a sawed-off rifle, several silencers and pen guns, and tools for making weapons fire automatically, in immediate proximity to the marijuana growing operation. The weapons were not in gun cases, but were mostly loaded and hung on peg board.

Perry testified that the firearms were seized after he called the assistant prosecutor for advice about whether to get a second search warrant. Garber told him that because he found marijuana in the vault, he should seize all the firearms.

The district court found that Perry had probable cause to believe the weapons were associated with criminal activity for several reasons. The court first found the officers had an independent basis to lawfully seized the firearms under Mich. Comp. Laws Ann. § 750.227(b), which provides in part that "[a] person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony[.]" While defendant contests this conclusion on the grounds that Perry did not specifically consider this statute as soon as he saw the weapons, it is clear that the proximity of the marijuana operation to the firearms was the stated reason for seizing the weapons.

Finally, we reject defendant's claim that the plain view exception does not apply because Perry did not immediately declare there was probable cause but, rather, hesitated and called Garber for advice. A reasonable person in Perry's situation would have had probable cause to believe there was violation of Michigan's felony-firearm

statute.[7]

Defendant has also argued that the incriminatory nature of the firearms themselves was not immediately apparent. *See e.g., United States v. Szymkowiak*, 727 F.2d 95 (6th Cir. 1984); *United States v. Beal*, 810 F.2d 574 (6th Cir. 1987). Having already found that the seizure of the firearms in the vault was justified under the plain view doctrine by their proximity to the marijuana growing in the vault, we need not decide whether the district court correctly concluded that the circumstances surrounding the firearms themselves would alone be sufficient to establish probable cause to believe they were illegally possessed. *See Wolfe I*, 22 F. Supp.2d at 642 (citations omitted).

**AFFIRMED.**

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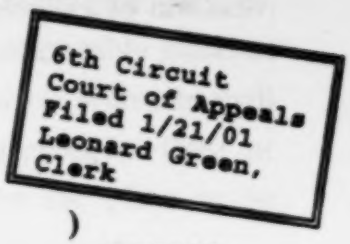
[7]Defendant also argues that reliance upon this statute is flawed because *People v. Williams*, 538 N.W.2d 89 (Mich. App. 1995), held that a firearm must be accessible to the defendant at the time it was discovered in order to support a felony-firearm conviction under the statute. There is no dispute that defendant had already been removed from the premises. However, not only was *Williams* recently overruled by the Michigan Supreme Court in *People v. Burgenmeyer*, 606 N.W.2d 645 (Mich. 2000), but also its holding concerning the proof necessary to support a conviction would not negate the existence of probable cause to believe there was a violation of the statute.

**Case № 99-1696**

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**




**UNITED STATES OF AMERICA,**
***Plaintiff-Appellee,***

**vs.**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant-Appellant.***

**ORDER**

**BEFORE: GUY AND MOORE, Circuit Judges; and DOWD, *District Judge.**

The court having received a petition for rehearing *en banc*, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing *en banc*, the petition for rehearing has been referred to the original panel.

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***Hon. David D. Dowd, Jr., Senior United States District Judge for the Northern District of Ohio, sitting by designation.**

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

/s/ Leonard Green
Leonard Green, Clerk

## AMENDMENT 4

**Unreasonable searches and seizures.**
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath pr affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## AMENDMENT 5

**Criminal actions - Provisions concerning - Due process of law and just compensation clauses.**
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, with due process of law; nor shall private property be taken for public use, without just compensation.

## AMENDMENT 6

**Rights of the accused.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

## 28 U.S.C. §1738

**§1738. State and Territorial statutes and judicial proceedings, full faith and credit.**

The Acts of legislature of any State, Territory or Possession of the United States, or copes thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

## M.C.L.A. §780.655

**§780.655. Tabulation of property seized; filing; safekeeping of property; restoration to owner; disposition of other property**

Sec. 5. When an officer in the execution of a search warrant finds any property or seizes any of the other things for which a search warrant is allows by this act, the officer, in the presence of the person from whose possession or premises the property or thing was taken, if present, or in the presence of at least 1 other person, shall make a complete and accurate tabulation of the property and things so seized. The officer taking property or other things under the warrant shall forthwith give to the person from whom or from whose premises the property was taken a copy of the warrant and shall give to the person a copy of the tabulation upon completion, or shall leave a copy of the warrant and tabulation at the place from which the property or thing was taken. He shall file the tabulation promptly with the court or magistrate. The tabulation may be suppressed by order of the court until the final disposition of the case unless otherwise ordered. The property and things so seized shall be safely kept by the officer so long as necessary for the purpose of being produced or used as evidence on any trial. As soon as practicable after trial, stolen or embezzled property shall be restored to the owner

thereof. Other things seized under the warrant shall be disposed of under direction of the court or magistrate, except that moneys and other useful property shall be turned over to the state, county or municipality, the officers of which seized the property under the warrant. Such moneys shall be credited to the general fund of the state, county or municipality.

## M.C.L.A. §780.656

### §780.656. Breaking of doors and windows

Sec. 6. The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything herein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant.

**INTERVIEW SUSPECT: Harold Van Patten**

On 12/06/96 at 11:50 p.m. the undersigned detective phoned Harold Van Patten's brother Scott Van Patten and was told to meet him and his brother ate the Log Cabin Bar at 12:30 p.m. The undersigned then met the brothers and began the interview with Harold Van Patten at 12:43 p.m. (It will be noted that no alcohol had been consumed by any party to the interview for its duration).

The undersigned informed Harold Van Patten that he was not under arrest and could leave at any time. Harold Van Patten stated that he began living in the top portion of a barn at Ron Wolfe's property in late January of 1996. He was told by Ron Wolfe to leave his property on 11/24/96 due to lake of work as a handyman. Harold stated that he had been building a anew pole-barn for Wolfe and building other items for the house.

Harold stated that late at night in mid August 1996 he was awaken by Ron Wolfe. Wolfe told him to get out of bed an go with him. Harold got out of bed and accompanied Ron Wolfe in his p/u truck. Harold also noticed that Ron Wolfe, Jr. (known as Junior) was driving another p/u truck owned by his roommate named Richard who was with him. The Wolfe's were in possession of walkie-talkie's so they could communicate with one another. The four then left the Wolfe residence and drove to a field located in the area of the southeast corner of

Latson and Brophy Roads. Ron Wolfe exited the p/u on a two-track leading to the rear of the field. Ron Wolfe, holding his walkie-talkie, then told Harold to drive the truck to the end of the two-track with Junior and the other guy. Harold drove the truck to the rear of the field where he observed two hay wagons full of hay. Harold stated that he hooked up one of the hay wagons at Junior's direction. Harold stated that Ron Wolfe had bought new, large, bolts to be used for the hook-ups. Junior and his friend hooked up the other hay wagon. Harold then drove the stolen hay to the ditch at Latson Road and picked up Ron Wolfe.

Harold stated that he drive down Brophy for a short distance but was so upset after realizing that the Wolfe's were stealing the hay, that he pulled over and Ron Wolfe took the wheel. Harold stated that Ron Wolfe followed by his son, drove the stolen hay to an old plane hangar on the north side of his property. Harold stated that they had to drive through a stand of pines to get to the hanger. There the four unloaded approximately 250 bales of hay onto the ground outside the hangar. Harold stated that the four then took the two empty, stolen wagons to Listerman Road and dumped them. Harold stated that while he was with Ron Wolfe and his son that night, both Ron and Junior were carrying pistols in their belts. Harold stated by the time he realized what was going on with the hay he was too afraid for his life to not assist the Wolfes with the theft. No

further information was taken by the undersigned regarding that crime.

**NOTIFICATION:**

On 12/06/96 the undersigned detective received a call from the victim Kathy Kaminsky. Ms. Kaminsky stated that she had information pertaining to the larcenies that had occurred at two of her construction sites. Ms. Kaminsky stated that she had heard rumors that a man by the name of Ron Wolfe steals her construction materials from both sites. Ms. Kaminsky mentioned that a man named Bill Harp who knows Wolfe may have information.

**INTERVIEW WITNESS:**

On 12/10/96 the undersigned conducted an interview with William Harp at the Pathway School in Howell. Mr. Harp stated that on 11/15/96 he was at the home of Tony Miller who resides next door to Ron Wolfe. Miller was complaining to Harp that Wolfe was poaching deer and leaving the remains in the creek just onto his property. When the two visited the site, Harp observed that Wolfe was building a new pole barn which was sided with several pieces of OSB board. Having nothing further to add, that portion of the interview was then concluded.

**INTERVIEW WITNESS: Harold Van Patten**

On 12/06/96 at 12:23 p.m. the undersigned conducted an interview with Harold Van Patten. Van Patten stated that on 9/15/96 he had been living in the upper portion of Ron Wolfe's pole barn and working as the handyman. Van Patten stated that when he got up that morning he went outside and saw materials laying on the ground where Ron Wolfe had instructed him to building the pole barn. Van Patten saw a ton of OSB board stacked up along with 2 x 4's, 2 x 6's, 2 x 12's and several boxes of nails. Ron Wolfe told Van Patten that day that they stole 185 sheets of OSB. Wolfe told Van Patten that they used Junior's (Ron Wolfe's son) p/u truck and had to make several trips from a Craftech home on Byron Road. Van Patten then used the materials to construct the pole barn and completed everything but the roof in late October. Van Patten stated that Rick (Culbert)s name was mentioned by Ron Wolfe as having been with them also. Having nothing further to add, the interview was then concluded.

Respectfully Submitted,

/s/ Al Perry
**Detective Al Perry #154**
**Livingston County**
**Sheriff Department**

**INTERVIEW WITNESS: William Harp**

On 12/10/96 the undersigned spoke with William Harp, a former friend to Ron Wolfe. Mr. Harp stated that on November 15, 1996 he was at the home of Tony Miller located at 5665 Fisher Road, Howell. Mr. Miller was showing Mr. Harp some deer remains in his creek and complaining that Ron Wolfe had been poaching at night and had been throwing the deer remains in the creek just over the Wolfe property line and onto Miller's property. While at the creek location, Harp noticed that there had been a new pole barn constructed on Ron Wolfe's property. Mr. Harp observed that the barn had not been complete having only OSB and new shingles on the exterior. Having nothing further to add, the interview was then concluded.

**INTERVIEW WITNESS: Harold Van Patten**

On 12/06/96 at 12:43 p.m. the undersigned detective conducted an interview with Harold Van Patten. Mr. Van Patten told the undersigned that on 9/28/96 he was still living in the upper portion Ron Wolfe's pole barn while he was building a new pole barn for Wolfe. Van Patten after installing the several sheets of OSB, he informed Wolfe that he was ready for the roof and needed about twenty-one (21) square of shingle. Mr. Van Patten stated that when he got up that Saturday morning he observed twenty-five (25)

square of shingles laying on the ground next to the pole barn. He also saw one roll of #90 rolled roofing, five rolls of #15 felt rolls, and one roll of ice guard. Van Patten stated that all the materials bore the brand name of CONS. Van Patten began roofing that day. Wolfe, Jr. told Van Patten that day that he and Rick (Culbert) climbed up on the roof at a house at Fisher and Clyde Roads and three the shingles to the ground. Van Patten stated that some of the shingles squares were broken when he observed them that morning. Having nothing further to add that portion of the interview was then concluded.

Respectfully Submitted,

/s/ Al Perry
**Detective Al Perry #154**
Livingston County
Sheriff Department

**Livingston County Sheriff Department**
150 S. Highlander Way, Howell, MI.
(517) 546-2440

| | |
|---|---|
| **DETECTIVE BUREAU OFFENSE REPORT ORIGINAL** | Complaint: No. 147-12960-96<br><br>Anthony Re FC: 2308 Oakpointe County Club) |
| | Address:<br><br>4500 Club Drive |
| Offense:<br><br>Assist MSP Brighton with larceny of golf carts | Detective Assigned:<br><br>Perry |
| Original date: 1/07/95 | |

## DETECTIVE'S INVESTIGATION

**RELATED MSP #** 12-145-95

**VENUE:** See attached MSP report.

**DATE/TIME:** See attached MSP report.

**SUSPECTS:**

| | |
|---|---|
| Ron Napoleon Wolfe | Ronald N. Wolfe, Jr. |
| w/m dob-6/19/53 | w/m dob 3/24/73 |
| 5753 Fisher Road | 15617 Pine Ridge Dr. |
| Howell, MI 48843 | Linden, MI 48451-8753 |

#3 unknown name
w/m 30's

**WITNESS:** William Harp
3780 Clyde Road
Howell, MI 48843
546-0366

**INTERVIEW WITNESS:** William Harp

On 12/10/96 at 9:22 p.m. the undersigned detective conducted an interview with William Harp at the Pathway school in Howell. Mr. Harp had volunteered to come and talk with the undersigned and was not under arrest, nor was he given Miranda at the time.

Mr. Harp stated that in early January of 1995 he received a call from then acquaintance Ron Wolfe asking to borrow his suburban. Harp thought Wolfe's request unusual due to the heavy snowfall that was occurring. Harp agreed and could not recall whether he drove the suburban to Wolfe's house or Wolfe's son Junior came and got the vehicle. In any even, Junior ended up at Harp's house with the suburban pulling Ron Wolfe's horse trailer and he was accompanied by a w/m subject in his thirties. Ron Wolfe showed up driving his grey Dynasty and asked Harp to go with him to run an errand.

Harp then road with Ron Wolfe to the rear of the restaurant at Oakpointe. There they met Junior Wolfe and the other subject. Junior had taken a .22 cal rifle along and

stated that he was going to shoot out the streetlight if necessary. Ron Wolfe was armed with a Sig Sauer pistol tucked in his back belt. Marie, Ron Wolfe's then girlfriend, now wife, was employed at the restaurant at the time of the theft. Ron and Junior and walkie-talkie's that they using to communicate at times. Harp then assisted Ron, Junior and the other subject load two cream colored Club Car typed golf carts in the horse trailer. One cart had a roof and the other not. The horse trailer then went to Harp's barn where one golf cart was unloaded and stored. The other golf cart went to Ron Wolfe's property were he is still using it to traverse his property.

Harp also remembered that there was a third Club Car brand golf cart on the Wolfe property. Ron Wolfe tried to paint his two stolen Club Cars camouflage. Having nothing further to add, the interview was then concluded.

Respectfully Submitted,

/s/ Al Perry
**Detective Al Perry #154**
Livingston County
Sheriff Department

**Livingston County Sheriff Department**
150 S. Highlander Way, Howell, MI.
(517) 546-2440

| | |
|---|---|
| **DETECTIVE BUREAU OFFENSE REPORT ORIGINAL** | Complaint: No. 147-12965-96<br><br>Det/Sgt. FC: 2307<br>Robert<br>Swackhammer |
| | Address:<br><br>MSP#12 BRIGHTON |
| Offense:<br><br>Assist MSP with Stolen Horses Investigation | Detective Assigned:<br><br>Perry |
| Original date: 12/18/96 | |

## DETECTIVE'S INVESTIGATION

### NOTIFICATION:

On Wednesday 12/18/96 at 10:00 p.m. the undersigned detective was talking with Harold Van Patten at the Livingston County Prosecutor's Office. Mr. Van Patten made statements about caring for two horses in May of 1996. This statement led the undersigned into the following investigation.

**WITNESS:** Harold Van Patten
1111 Faussett Road
Howell, MI 48843
546-3557

**SUSPECT:** Ronald Napoleon Wolfe
w/m dob-6/19/53
5753 Fisher Road
Howell, MI 48843

AKA/Ronald Nap Wolfe

**STATEMENT OF WITNESS:**

On 12/18/96 the undersigned spoke with Harold Van Patten. Mr. Van Patten stated that in mid-May 1996 he resided in the upper portion of Ron Wolfe's pole barn. During that time Ron Wolfe brought home two horses and put them in stalls in the same pole barn where Van Patten resided.

Wolfe told Van Patten that he had received a call at 3:00 a.m. from a woman who told Wolfe that her barn had just burned down. The woman then asked Wolfe to keep her horses for her. Van Patten did not question the explanation and fed the horses for three weeks. Then on Saturday, Wolfe removed the horses and Van Patten never saw them again.

Van Patten described the first horse as being a brown colored stallion. Van Patten described the second horse as being a white and tan pinto mare and he added that she was very distinctive by saying "you can't miss her".

Mr. Van Patten stated that on Saturday 12/14/96 he was shown photographs of the horses by his friend Clifford Stamper. Stamper told him he worked with a lady who had two horses stolen in May of 96. Van Patten stated that he looked at the photographs and positively identified the white and tan pinto mare as being the horse that Ron Wolfe brought to his pole barn in May. Van Patten stated that he thought the brown horse in the photo was the same that Wolfe brought home but he could not be positive. Having nothing further to add the interview was then concluded.

Respectfully Submitted,

/s/ Al Perry
**Detective Al Perry #154**
Livingston County
Sheriff Department

| STATE OF MICHIGAN JUDICIAL DISTRICT | AFFIDAVIT FOR SEARCH WARRANT | CASE NO. |
|---|---|---|

**Police Agency**
**Report Number: Livingston County Sheriff Department**

**Detective Allan Perry**, affiant(s), state that:

1. The person, place, or thing to be searched is described as and is located at:

The entire premises including the residence and outbuildings commonly referred to as 5753 Fisher Road; said premises include a multi story log construction residence located on the west side of Fisher Road in Section 1 of Howell Township, Livingston County, a gray barn with a brown roof having living quarters in the upper story that is located South of the log constructed residence and a gray airplane hangar structure with a steel roof located north/northeast of the log constructed residence.

2. The PROPERTY to be searched for and seized, if found, is specifically described as:

State of Michigan,
Livingston County
Circuit Court
Filed 12/19/96

Documents or evidence indicative of the ownership or occupancy of the above premises; insurance records including contracts, claim forms and payment forms; bales of hay; golf carts; records relating to building materials for the structures on the premises; shingle samples; building material samples; photographs; records relating to the purchase, ownership or registration of firearms; records relating to the possession, ownership or registration of vehicles; records or evidence relating to the horse ownership, sales or veterinary treatment.

3. The FACTS establishing probable cause or the grounds for search are:

1) Affiant is a Deputy with the Livingston County Sheriff's Department and has been so employed for 20 years. Affiant is presently assigned to the Detective Bureau within the Livingston County Sheriff's Department. Affiant along with other officers from the Livingston County Sheriff's Department, the Michigan State Police and the Federal Alcohol and Tobacco and Firearms Division has been conducting an investigation relating to certain larceny and fraud crimes in which the suspects are as follows:

A) Ronald Napoleon Wolfe, white male, DOB 06/19/53;

B) Ronald Napoleon Wolfe, Jr., white male, DOB 08/14/73;

C) Richard Herbert Culbert, white male, DOB 03/01/61; DOB Richard William Musson, white male, DOB 03/24/73.

Through investigation, public records, and affiant's personal knowledge, it has been determined that Ronald Napoleon Wolfe resides at the above place to be searched. Ronald Napoleon Wolfe, Jr. if the son of Ronald Napoleon Wolfe and resides at 15617 Pine Ridge Drive, Linden, Michigan 48451-8753. Richard Herbert Culbert is a neighbor and acquaintance of Ronald Napoleon Wolfe and resides a 2244 Fisher Curt, Howell, Michigan 48843. Richard William Musson is an acquaintance and associate of both of the Wolfe suspects and resides with Ronald Napoleon Wolfe, Jr. in Linden, Michigan.

2) Through the course of the investigation, Affiant has had occasion to personally interview Harold Van Patten who resided at 1111 Faussett Road, in Howell, Michigan. Affiant has also personally interviewed William Harp who resides at 3780 Clyde Road, Howell, Michigan 48843. Both Van Patten and Harp are past associates and acquaintances of the suspects. More specifically, Van

Patten and Harp have repeatedly been at the above premises to be searched over the past several years.

On August 19, 1996 at approximately 12:30 a.m. two wagon loads of hay were stolen from a hay field in Section 21 of Oceola Township, Livingston County, which was located on the east side of Latson Road South of Brophy Road and approximately 4 miles from the above place to be searched. The theft was reported by the lessee of the property, Robert Salmon, of Howell, Michigan who had baled the hay and noted that the baling machine was making an unusual loop in the twine knots at the time the hay was baled. Approximately two hundred bales of hay were taken and the wagon tracks were noted to have departed the field heading in the direction of the premises to be searched. The wagons were subsequently discovered empty and abandoned on the west side of Listerman Road south of Curdy Road in Livingston County and it was noted pine bough pieces and pine cones were located on the wagons by the investigating deputy, Thomas Dorsey of the Livingston County Sheriff's Department. Affiant interviewed Harold Van Patten who indicated that during the time frame in question, he was residing in the living quarters of the gray barn located south of the residence on the above premises to be searched. He was awakened by Ronald Napoleon Wolfe one night and asked to assist Wolfe with an unknown project. Van Patten told affiant that he

accompanied Ronald Napoleon Wolfe, Richard William Musson and Ronald Napoleon Wolfe, Jr. in two pickup trucks which were driven to the hay field in question. The hay wagons were hitched to the pickup trucks and driven to the above premises to be searched where the hay was unloaded and subsequently stacked in the airplane hangar structure nor/northeast of the residence on those premises. Van Patten noted that the hay wagons had to be driven through an area of pine trees to get to the airplane hangar structure and affiant has personally verified that numerous pine trees are in the vicinity of the premises. Additionally, Van Patten's description of the direction in which the pickup trucks and wagons traveled in consistent with the tracks which were discovered at the scene of the offense. Van Patten noted that both Ronald Napoleon Wolfe and Ronald Napoleon Wolfe, Jr. were armed with automatic pistols at the time of the theft of the hay. Van Patten was in the National Guard and has some familiarity with handguns. Affiant has personally verified that Wolfe has livestock on the premises to be searched which utilize hay as part of their diet. Through affiant's investigation, it has been determined that Ronald Napoleon Wolfe knew the prior Lessee of the hay field's in question and knew of the hay field location.

In the early morning hours of September 15, 1996, building materials were stolen rom the construction site of a new home located at 5195 Byron Road, Howell

Township, Livingston County. Included within the stolen materials were approximately 172 sheets of 4 x 8 x 7/16 OSB board, twenty 2 x 12 x 16 boards, thirty 2 x 4 x 14 boards, fifteen 2 x 6 x 16 boards and three boxes of 8D nails. The thefts were reported to the Livingston County Sheriff's Department by Bradley Wright of 5435 Byron Road in Howell, Michigan and Deputy Keith Hutchings took the original report. The home under reconstruction was owned by Craftech Homes and was located within 2 miles of the above place to be search. Affiant interviewed Harold Van Patten who stated at that while he was living on the premises to be searched, he was employed by Ronald Napoleon Wolfe to construct the new pole barn located southeast of the log construction residence. Van Patten indicated that during the time frame in question, Wolfe provided a delivery of building materials which matched the itemized list of property stolen from the construction site at 5195 Byron Road. Van Patten indicated that Ronald Napoleon Wolfe, Ronald Napoleon Wolfe, Jr., and Richard Herbert Culbert subsequently admitted that those materials had been stolen from the Byron Road construction site. Through Howell Township Records, Affiant has determined that no construction permit was pulled for construction of the new pole barn of the premises to be searched.

During the early morning hours of September 28, 1996 a quantity of roofing materials was stolen from the construction site of a residence located at 5110 Fisher Road

in Oceola Township, Livingston County. Those materials included dark brown shingles, ice guard, 15 lb. felt, and 90 lb. rolled roofing. The theft was discovered by the complainant James Canfield who was working at the site and reported to Deputv Paul Eggleston of the Livingston County Sheriff's Department. The owner of the home under construction was Craftech Homes. The construction site was located within 1/2 mile of the premises to be searched. Affiant interviewed Harold Van Patten who indicated that he had observed the roofing materials at the construction site in question with the shingles being loaded onto the roof of the residence being constructed at 5110 Fisher Road. Shortly thereafter, Ronald Napoleon Wolfe made a deliver of roofing materials to the pole barn under construction on the premises to be searched. The roofing materials provided by Wolfe matched the itemized list of the roofing materials stolen from the Fisher Road construction site and the shingle color of those materials also matched the color of the shingles stolen from the Fisher Road construction sight. A day or two later, Van Patten told Affiant that he noticed that the roofing materials at the Fisher Road Site has disappeared and subsequently Ronald Napoleon Wolfe and Ronald Napoleon Wolfe, Jr. admitted having stolen the roofing materials from the Fisher Road construction site so that they could be used on the roof of the pole barn under construction on the above premises to be searched. Affiant also interviewed William

Harp who had personally observed the pole barn under construction. Harp verified the dark brown color of the shingle provided by Ronald Napoleon Wolfe which were nailed onto the pole barn roof by Harold Van Patten. Van Patten also recalled that the bundles of shingles had been damaged in a manner consistent with having been thrown off the roof of the home under construction at 5110 Fisher Road. Affiant has determined that both of the construction sites described in the paragraphs above are in relatively close proximity to the premises to be searched. Additionally, Affiant has verified that the description of the construction material thefts provided by Van Patten matched the weekend dates of the original reports on file at the Livingston County Sheriff's Department.

Affiant is also investigating the theft of two golf carts form the Oak Pointe Golf Course located at 5431 Brighton Road, Genoa Township, Livingston County. On or about January 7, 1995 two gas driven, cream in color "Club Car" golf carts were stolen from the golf course. That theft was reported to Trooper Halliday of the Michigan State Police by the golf pro, Anthony Re. Affiant interviewed William Harp who indicated that during the time frame in question he was approached by Ronald Napoleon Wolfe who asked to borrow Harp's wife's vehicle, a 4 wheel drive Chevrolet Suburban. Harp recalled that Wolfe borrowed that vehicle in the late evening hours of the date in question and that a snow storm was occurring

shortly thereafter. Harp accompanied Wolfe in wolfe's vehicle to Vic and Bob's Party Store located at the corner of Brighton Road and Chilson Road in Genoa Township, Livingston County. At that time, Harp overheard Wolfe talking to Ronald Napoleon Wolfe, Jr. via walkie-talkie radio. Wolfe and Harp then drove a short distance to the Oak Pointe Golf Course where Harp observed a four horse trailer hitched to his Wolfe's Chevrolet Suburban vehicle in the parking lot of the golf course. Harp observed the Wolfe's stealing and loading two cream colored "Club Car" golf carats into the horse trailer. Thereafter, in the company of Ronald Napoleon Wolfe, Harp followed the Suburban and horse trailer driven by Ronald Napoleon Wolfe, Jr. to Harp's home. At that location, Wolfe gave Harp one of the golf carts and took the other to the above premises to be searched. Affiant has verified through serial numbers that the golf cart in Harp's possession was one of the two carts stolen from the Oak Pointe Golf Course on January 7, 1995. Additionally, Harold Van Patten provided a photograph taken in October 1996 to affiant which depicts a golf cart parked near the log constructed residence on the premises to be searched. Additionally, Affiant has spoken to Detective Robert Swackhammer of the Michigan State Police and Swackhammer indicated that he has observed golf carts on the property to be searched while he was there on an unrelated matter.

Affiant is also investigating the theft of two horses occurring on or about May 23, 1996 from the residence of Complainant Jean Wainscott located at 7485 Byron Road in Cohoclah Township, Livingston County. Said residence is located approximately 4 miles from the above premises to be searched. That theft was originally reported to Trooper Rosebrough of the Michigan State Police. Affiant has interviewed Wainscott and determined that one of the horses was a dark brown color with a white star on its forehead while the other horse was a distinctively colored, white and than pinto. Affiant interviewed Harold Van Patten who indicated that while he resided on the above premises to be searched in 1996, he personally observed and cared for two horses which had been stabled in the lower level of the gray barn south of the log constructed residence on the premises to be searched. Van Patten told affiant that Ronald Napoleon Wolfe had brought two horses to the premises in mid May of 1996 where they were kept for approximately three weeks and thereafter removed on a Saturday. Van Patten was provided a photograph obtained from Jean Wainscott and van Patten positively identified that horse as being one of the two in the stable during the time. Through various witness interviews and investigations affiant has determined that Ronald Napoleon Wolfe and the owners of the Michigan Horse Auction at 7335 Old U.S. 23 in Fenton are close friends. Affiant has further determined that horse auctions are conducted on Saturdays at the Michigan Horse

Auction premises. Van Patten also told Affiant that the second horse stolen from Wainscott was similar in description to the second horse stabled by Wolfe on the premises to be searched.

Affiant is also investigating a potential insurance fraud crime involving new windows which were installed in the log construction residence on the above premises to be searched. Affiant interviewed William Harp who indicated that in the mid to later summer of 1994 Ronald Napoleon Wolfe dropped off a shipment of new residential windows at Harp's residence. Wolfe asked Harp to store those windows at that location. Approximately 1 month to 6 weeks later, Ronald Napoleon Wolfe, Jr. began delivering the windows in repeated pickup truck loads to the log constructed residence on the premises to be searched. Harold Van Patten was also interviewed and indicated that he was assisting in the construction of that log constructed residence at the time. Van Patten noted that the entire house had been framed and was ready for windows but the window deliveries were made piecemeal by Ronald Napoleon Wolfe, Jr.. Affiant, subsequently interviewed Harold Van Patten's brother Scott Van Patten, who indicated that Ronald Napoleon Wolfe had stated that he had made an insurance claim and recovered money for his "stolen windows". Affiant believes that the windows had originally been delivered to the construction site, and thereafter concealed at Harp's residence for sufficient time

for Wolfe to make a fraudulent insurance claim for a phony theft of said windows.

In interviews with Harold Van Patten and William Harp along with other witnesses, it has been determined that Ronald Napoleon Wolfe commonly carries a handgun even when he is engaged in activities such as going to a grocery store. Van Patten, Harp and others have personally observed numerous firearms on the premises to be searched. Investigation with agent Randy Evans of the Alcohol, Tobacco and Firearms Division has determined that Ronald Napoleon Wolfe has a Federal Firearms Dealer License and Affiant has verified that Wolfe has registered firearms within Livingston County.

Wherefore the people pray that this warrant be issued otherwise valuable evidence may be lost to the detriment of the People.

| STATE OF MICHIGAN JUDICIAL DISTRICT | AFFIDAVIT FOR SEARCH WARRANT | DEFENDANT'S EXHIBIT #2 |
|---|---|---|

**Police Agency**
**Report Number:** **Livingston County Sheriff Department**

Detective Allan Perry, has sworn to the attached affidavit regarding the following:

1. THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: I have fund that probable cause exists and you are commanded to make the search and seize the described property. Leave a copy of this warrant with affidavit attached and a tabulation (a written inventory) of all property taken with the person from whom the property was taken or at the premises. You are further commanded to promptly return this warrant and tabulations to the court.

Issued: 23, December 96 7:15 A.M.
Date

s/s _____
Judge Signature

State of Michigan,
Livingston County
Circuit Court
Filed 12/23/96

## RETURN AND TABULATION

Search was made 12/23/96 and the following property was seized:

Sixty Bales of Hay; Two Pagers; Three-Four Switchblades
Two Club Car Golf Carts; One Nail Gun with Serial #
One Campbell Hoosefield Scanner;
Misc Papers to Establish Residency & Licensing

| | | |
|---|---|---|
| Twenty-Two Long Guns | ) | |
| Sixteen Short Guns | ) | Basement |
| Forty-Eight Hand Guns | ) | |
| Seven Long Guns | ) | |
| Four Hand Guns | ) | Upstairs |
| Eight Magazines | ) | |
| One Pine Brass Knuckles | ) | |

Growing Operation Marijuana & Materials;
Shingle Square Wrap Paper;
Ashtray Containing Roaches & Narcotic Paraphanalia

**Allan Perry**
Officer

Copy of affidavit, warrant, and tabulation served on:
Marie Elizabeth Wolfe

Tabulation filed: My Copy

**Livingston County Sheriff Department**
150 S. Highlander Way
Howell, MI 48843
(517) 546-2440

| | |
|---|---|
| **DETECTIVE BUREAU OFFENSE REPORT ORIGINAL** | Complaint: No. 147-147-8668-96<br><br>Anthony Re FC: 2399 |
| | Address:<br><br>4600 E. Allen Road; Howell, MI |
| Offense:<br><br>Larcency 0/100 (hay) | Detective Assigned:<br><br>Perry |
| Original date: 8/19/96 | Supplement date: 8/05/97 |

## DETECTIVE'S INVESTIGATION

**ASSIST ATF:**

State of Michigan,
Livingston County
Circuit Court
Filed 8/5/97

On February 3, 1997 the undersigned detective met with ATF Special Agent Randy Evans at the Livingston County Sheriff Department in Howell, MI. The purpose of the meeting was to allow SA Evans to examine weapons that were confiscated during a search warrant that had been

conducted on 12/23/96 at the home of Ronald Napoleon Wolfe which was located at 5753 Fisher Road, Howell, MI. As a result of the examination, SA Evans took into custody several weapons (See attached ATF Property Inventory Report).

The undersigned Detective again met with SA Evans on August 1, 1997 and at that time SA Evans requested that the undersigned prepare a report involving the circumstances surrounding the confiscating of the weapons during the search.

**SEARCH WARRANT: 12/23/96 0807hrs**

PRESENT:

Sgt. Gerald Ellsworth
(with and in charge of MSP SWAT TEAM)
Det/ Sgt Robert Swackhamer
(Mich State Police)
Lt Ivan Deering
(Livingston County Sheriff Department)
Det. Todd Luzod (LCSD)
Det. Edwin Moore (LCSD)
Det. Allan Perry (LCSD)
Dep. Michael Hawry (LCSD)
Dep. James Bolling (LCSD)
Det. John Westendorf (Brighton City Police)

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION-FLINT**

**UNITED STATES OF AMERICA**
***Plaintiff,***

**CASE NO. 97-50065**

**vs.** **HONORABLE PAUL GADOLA**
**U.S. DISTRICT JUDGE**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

State of Michigan,
Livingston County
Circuit Court
Filed 8/19/98

**FIRST SUPERSEDING INDICTMENT**

THE GRAND JURY CHARGES:

**COUNT ONE**

[Possession of Unregistered Machine gun; 26 U.S.C. §5861 (d)]

That on or about December 21, 1996, at 5753 Fischer Road, Howell, in the Eastern District of Michigan, RONALD NAPOLEON WOLFE, SR. knowingly possessed a machine gun not registered to him in the National Firearms Registration and Transfer Record, that is, an

I.B.M. M1 United States Military .30 caliber carbine bearing serial number 3657736 and modified to shoot automatically more than one shot by a single function of the trigger without manual reloading; all violation of Section 5861 (d) of Title 26, United States Code.

**COUNT TWO**

[Possession of Unregistered Machine gun; 26 U.S.C. §5861(d)]

That on or about December 21, 1996, at 5753 Fisher Road, Howell, in the Eastern

**STATE OF MICHIGAN**
**44TH JUDICIAL CIRCUIT COURT**
**(LIVINGSTON COUNTY)**

**CASE NO. 99-9961-FH:**

**THE PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***

**vs.**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

**CASE NO. 99-9962-FH:**

**THE PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***

**vs.**

**MARIE ELIZABETH WOLFE,**
***Defendant.***

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# MOTION TO QUASH

VOLUME I

TAKEN BY VIDEO TAPE RECORDING

**BEFORE THE HONORABLE DANIEL BURRESS,**
**CIRCUIT JUDGE**

Howell, Michigan - Monday, February 9, 1998

**APPEARANCES:**

For the People:
MR. DANIEL W. ROSE (P40459)
Prosecutor's Office
210 South Highlander Way
Howell, Michigan 48843
(517) 546-1850

For Ron Wolfe:
MR. KENNETH G. MCINTYRE (P17449)
Sinas, Dramis
520 Seymour Avenue
Lansing, Michigan 48933-1192
(517) 372-7780

Livingston-Oakland Court Reporting
(810) 229-9487

Clerk, testified:

THE COURT: When you're seated and comfortable, state your name for the record and spell your last name.

THE WITNESS: Alan Perry, P-E-R-R-Y.

MR. MCINTYRE: Your Honor, before I begin, I would at this point like to tender proposed Exhibits 2 and 3 which as I understand them are copies of the return and tabulation of the December 23rd, 1996 search.

* * *

DIRECT EXAMINATION

BY MR. MCINTYRE:

Q Mr. Perry, what do you do, sir?

A I'm a detective with Livingston County Sheriff's Department.

Q And how long has that been the case?

A How long have I been employed there or how long have I been a detective?

Q Employed there, I'm sorry.

A Twenty-one years.

Q Your--your date of beginning your service with the Livingston County Sheriff's Department was what, sir?

A I was hired on December 29th, 1976. And began on January 2nd, 1977.

* * *

Q Did you know there was a gun vault behind that bookshelf--

A Yes.

Q --when you went down the basement?

A Yes.

Q And how did you know that?

A Several individuals had told me that it had--or that it existed there.

Q And who would be included within several? Names.

A William Harp. Harold Van Patten. And I'm not sure--I guess that's it.

Q And when were you told by either Mr. Harp or Mr. Van Patten that the Wolfe home had a gun vault in the basement?

A In their initial interviews.

Q Mr. Van Patten as I recall the write ups was initially interviewed in December 6th. That sound right?

A That sounds right.

* * *

A No.

Q And, when you interviewed Mr. Harp you made no mention of his having told you that there was a gun vault in the basement, either, right?

A No.

Q And since you didn't know on December 23rd that anything illegal or stolen was in the gun vault, that would explain why you wouldn't write it up, wouldn't it, sir? No big deal.

A No, it's a part of the house. I don't have--didn't have any reason to write it up specifically. It's a container just like every other part of the house.

* * *

THE COURT: Which judge?

MR. MARTIN: I can't answer that. It's not a Court that I typically practice in.

* * *

BY MR. MCINTYRE:

Q Det. Perry, I think I was still at the gun vault when we left off. Let me back up for a moment. What

is it that you were told by Mr. harp and/or by Mr. Van Patten about the contents of the gun vault?

A That there were guns in the gun vault.

Q Anything else?

A Machine guns. Silencers.

Q Anything else?

A I don't believe so.

Q Any description of the type of gun in the gun vault, or guns in the gun vault?

A I don't believe so.

Q For example, were you told that there were pistols, rifles, shotguns, anything specific along that line?

A Specifically what I was told I can't recall.

* * *

Q So we can write off security issue as a reason why you seized guns, correct?

A Well, guns is broad term. Now, you're talkin' about the entire house or specifically are you restricting the part of the search warrant to the gun vault why I seized the gun in the gun vault?

Q Yes.

A Is that what we're driving at here?

Q That's what I'm driving at this point. I'm going to generalize it to any gun, but right now I'm talking abut whether or not security was a reason for

you seizing the guns within the guns within the gun vault.

A No.

Q It was not.

A No.

Q You didn't have any authority to search for or seize guns under the search warrant--

A Correct.

Q --are we agreed on that?

A Correct.

Q And if we exclude security as a reason for seizing them, what was the reason?

A When I discovered the marijuana there, I called and spoke with the Prosecutor's office.

Q Ah.

A Asked them if I was--were to obtain another search warrant. And I was told that with the--the marijuana being there and--and the guns being there that I was to search--to seize both of those.

I had also been told previously by the DEA that if drugs are found--and this was just a matter of--I'm sorry, this was just a matter of training, that if drugs are found with weapons then weapons are seized as well.

Q was there any other reason why you seized the guns other than what you were told by the Prosecutor and DEA training in the gun vault?

A Well, I searched for records, a log book that would have listed the weapons. Some of them looked like they were automatic, although I'm not a weapons expert, that raised some suspicions with me. That was a part of it, but it wasn't my reason for seizing them.

* * *

Q And you called to see it you needed another search warrant, did I understand that right?

A Yes.

Q Okay. Because you recognized that your search warrant didn't authorize you to seize those guns, didn't you?

A That's correct.

Q And you knew those guns weren't going anywhere? Right, you could post a guard right there at the door, couldn't you, until you got another search warrant, couldn't you?

MR. ROSE: Objection. Compound question.

MR. MCINTYRE: Let me break it down.

BY MR. MCINTYRE:

Q You could have posted a guard at the vault door with instructions that nobody touches anything in that vault, couldn't you?

A Yes.

Q And that person could have been posted there long enough so that you could have gone and gotten another search warrant, right?

A Yes.

Q And allowed a judge to make a decision as to whether or not what you found by way of marijuana allowed you then to seized the guns. Right?

A Yes.

Q Okay. And your rationale or your reason for not doing that is basically you just took the word of you think the Assistant Prosecutor Garber and as confirmed by the DEA training that you'd received--

A Yes.

Q --or experiences you'd had. Right?

A Yes.

Q Okay. Did anybody from that day forward ask you to write down the basis upon which those guns were seized?

A The ATF requested--actually the U.S. Attorney requested a supplement from me.

* * *

yourself, please.

A Yes.

Q Det. Perry, when you made this report some time after August 1, 1997 pursuant to a request to explain why you had seized the guns from the gun vault, you made no mention of having called Assistant Prosecutor Garvey -- or Garber I guess his name is, or of any DEA training vis-a-vis the presence of drugs as a basis for seizing those weapons, did you, sir?

A Yes, in the last sentence I said that I obtain -- obtained permission from Chief Assistant Prosecutor Dan Garber.

* * *

Q Actually what you said wa, and I'm reading now from the last sentence on the second page of Exhibit 5. Base on the fact that insufficient paperwork was found for the weapons along with the threats by Ronald Wofle and the fact that the weapons were adjacent to the marijuana growing operation, the undersigned confiscated all the weapons. Right?

A That is correct.

Q Okay. The insufficient paperwork you're talking about would have to do with failure to have documents there that correlated with the guns.

A That's correct.

Q So you looked for that documentation before you seized the guns, didn't you?

A Yes.

* * *

Q Now did you tell Special Agent Evans of the ATF between December 19th and the 23rd that you were going to search Mr. Wolfe's home?

A Yes.

Q Why? Why was it necessary to tell him that?

A I told him that because there had been complaints. And I asked him if he could tell me what type of--what level of federal firearms license mr. Wolfe had and if there were any ongoing investigations involving Mr. Wolfe.

Q So, you asked him that between the 19th and the 23rd?

A It was some time in December. It may have been even before that. I'm not sure.

Q Okay. So you--well, you wouldn't have known before the 19th that you were going to search Mr. Wolfe's house on the 23rd, would you? That's when the affidavit was filed, the 19th. You understand my question? I may not have--

A Yes, but that's not true, either. In an investigation

I may know that there will be a search towards the end of the investigation if I have enough information to warrant the search. It would probably have been after I first talked to Harp and Van Patten.

Q That you would have talked to Mr. Evans?

A Yeah, well I had spoke to Mr. Evans prior to that on a couple of occasions.

Q About this matter?

A About the weapons. In recent years when I was approached by neighbors who complained of automatic gun fire.

Q Well, I want to be clear now on the sequence. Prior to December 19th when you signed the affidavit you had been told by neighbors they heard some sort of gun fire from the Wolfe property.

A Oh, yes.

Q And as a result of that you went and talked with Special Agent Evans. As a result of those reports. Am I understanding that correctly?

A. Yes.

* * *

BY MR. MCINTYRE:

Q For stolen property or documents relating to stolen property. Why would you be telling Evans--Special

Agent Evans that since his bailiwick is alcohol, tobacco and firearms?

A Well, because of the firearms that I had been told were there--

Q Well, you weren't told that--

A --it was a suggestion that--by Harp that the firearms were illegal, but I had no idea whether they were or whether they weren't.

Q When did Special Agent Evans tell you that there had to be a certain form of registration in order to allow legal possession of firearms?

A Well, he told me that a long time ago. He may have again reiterated that in my conversation with him in December.

Q Okay. If Mr. Harp told you there were some illegal weapons being stored by Mr. Wolfe on his property did you make any further investigation of that claim prior to December 19th?

A No.

Q And you didn't write up that report as part of the affidavit, we've already established that, right?

A No, I did not.

Q Okay. And when after December 23rd was the first time that you contacted Special Agent Evans of the ATF about the December 23rd search?

A Well, he had told me to let me know--

Q Let him know?

A --if I saw any of the items I asked him about.

Q Well, let me be clear. He's saying this to you before the 23rd?

A Yes.

Q And he's saying let me know if you, Det. Perry, find what again?

A If I needed any help with any of the items found, if I had any questions regarding any of the items found there. I asked him if Mr. Wolfe was allowed to possess silencers and automatic weapons. I couldn't get an answer. All I could get was--from Agent Evans is that if you find those things there, you can tell me. And so I did.

Q Did you call Special Agent Evans on the 23rd when you saw these weapons in the gun vault and couldn't find adequate--

A No.

Q --paperwork as you put it?

A No.

Q Did I understand you correctly to say that Mr. Evans told you that if you found anything of a weapon that might be of interest to him that he could be counted upon to help you sort out what to be done with that--what was to be done with that weapon? Did he say that?

A No. He didn't speak of disposition regarding any weapons seized or unseized.

Q Well, what was it that you intended to do with data about weapons if you found any weapons on the Wolfe premises vis-a-vis Mr. Evans? What was your mind set as to what to do if you found weapons in that gun vault that were consistent with that Mr. Harp had told you?

A Well, I would just simply tell Agent Evans what was there. I had noted all the weapons that were there. I'm assuming that he woulda known what to do if there was--if there was any action to be taken, I'm assuming that he woulda known what action to take.

Q So, one of your intentions when you went to the Wolfe house on the 23rd was to look for weapons, make note of what was there and report that to Mr. Evans, right?

MR. ROSE: Objection. Compound.

THE COURT: Try it over.

MR. ROSE: He has three things.

MR. MCINTYRE: All right.

BY MR. MCINTYRE:

Q Mr. Perry, was one of your objectives when you went to the Wolfe house to execute that search warrant to look for weapons?

A Yes.

Q And were the weapons you were looking for, did they include weapons in the gun safe?

A They could have.

Q You'd been told by either Mr. Harp or Mr. Van Patten or both that there were guns in the gun vault, right?

A I'd been told by them that they--Mr. Wolfe had used the weapons in the commission of the crimes that I was investigating.

Q Were you--let me make a note of that. Commission of the crimes, right? Mr. Van Patten told you that?

A Specifically?

Q Yes.

A Mr. Van Patten said that they were carrying weapons within.

Q Well, before this one gets away, let me--let me focus on that. In your affidavit the only crime of the six that you described involved any allegation of weaponry was the theft of the hay, was it not?

A That's all that's described. That's correct.

Q But you said in your affidavit was that Mr. Wolfe and his son were carrying automatic pistols. Right? You want to look at the--

A That's what was written.

Q Written in the affidavit.

A Yes.

Q And isn't it true, sir, that in the write up you made

of Mr. Van Patten's statement to you about that incident there was no mention of an automatic pistol at all, isn't that correct?

A That is correct?

Q What he said was pistol, pistols, right?

A That's correct. On that particular one.

Q Where did the word automatic come in on the affidavit if your source for that information was Mr. Van Patten?

A It did not come in.

Q Are you telling me it wasn't in the affidavit?

A No, it's in the affidavit. And the author of the affidavit put in automatic weapon, I would have said semi-automatic pistol, and I missed it.

Q You would have said semi-automatic pistol even though Mr. Van Patten's statement was pistol?

A Yeah, but Mr. Harp's statement was not pistol.

Q Mr. Harp--there's no write up of Mr. Harp saying anything about a pistol in the hay theft, was there?

A No.

Q Mr. Harp wasn't involved in the hay theft, allegedly, at all, was he?

A That's correct.

Q Where--where do you get any information suggesting Mr. Harp talked about a semi-automatic pistol in the hay theft?

A No, Mr. Harp didn't talk about it in the hay theft. He talked about it in the golf cart theft.

Q He did.

A Yes.

Q In the write up.

A I'm sorry, in the--

Q You put that in his write up.

A No.

Q Okay. All right. The only allegation in the four corners of the affidavit about a weapon is an automatic weapon, a theft, right?

A That's correct.

Q Talking about the affidavit, what the judge would have seen and drawn his conclusions from. It's clear that was a pistol, wasn't it, you talked about?

A Automatic pistols.

Q Okay. Now, your testimony as I understood you a moment ago was that you--one of the things you were looking for in the gun vault was that automatic pistol or pistols.

A Yes.

Q You know a difference between a pistol and an automatic rifle, do you not?

A Yes.

Q Pistol and a machine gun.

A Yes.

Q Pistol and a M-11 car beam?

A Yes.

Q So--

THE COURT: Mr. McIntyre.

MR. MCINTYRE: Excuse me.

BY MR. MCINTYRE:

Q The only mention in the affidavit of any gun being involved in any of these crimes did not include any suggestion that a weapon beyond a pistol, automatic or semi-automatic or whatever would be present on the premises, right? If you read that affidavit that's all you'd glean from it, wouldn't you?

A Yes.

Q Okay. And you had no information from Mr. Harp or Mr. Van Patten where, if at all, that gun was allegedly used in August hay theft was even on the Wolfe premises, didn't you, had no information of that effect.

A I don't believe so, no.

Q And you knew that Mr. Wolfe had a gun business down in Redford, Lahser Road I think, he and his mother, throughout this entire time, didn't you?

A Yes.

Q So you didn't know if Mr. Van Patten was telling you the truth about what happened with the hay and

the fact that there were guns carried by Mr. Wolfe and his son. You didn't know if those guns were on the Wolfe premises, downtown or anywhere else when you began executing the search warrant, did you?

MR. ROSE: Objection, confusing. He asked him if he thought the witness was telling the truth and then he asked about the locations.

MR. MCINTYRE: Huh?

MR. ROSE: That's my--

MR. MCINTYRE: Let me try it again.

MR. ROSE: --objection.

MR. MCINTYRE: Let me try it again.

BY MR. MCINTYRE:

Q There were a number of places that a pistol, if in fact a pistol was used in August to steal hay, could have been kept other than the Wolfe residence, correct?

A Yes.

Q Okay. And Mr. Van Patten and Mr. Harp never told you anything about where that pistol was ultimately taken to between August and December, did they?

A I don't believe so.

* * *

**STATE OF MICHIGAN**
**44TH JUDICIAL CIRCUIT COURT**
**(LIVINGSTON COUNTY)**

**CASE NO. 99-9961-FH**
**THE PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***
**vs.**
**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

**CASE NO. 99-9962-FH**
**THE PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***
**vs.**
**MARIE ELIZABETH WOLFE,**
***Defendant.***

# MOTION TO QUASH

VOLUME II

TAKEN BY VIDEO TAPE RECORDING

**BEFORE THE HONORABLE DANIEL BURRESS,**
**CIRCUIT JUDGE**

Howell, Michigan - Tuesday, February 10, 1998

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* * *

BY MR. MCINTYRE:

Q Well, I think the question that I asked this time was a twin to the earlier question. Basically I asked you whether or not it was true that as regards to stolen properties that were described to you by the witnesses, none of them told you that any of this property was stored, or still present in the Wolfe residence, did they?

A I don't believe so.

Q So the only basis you would have for searching within the Wolfe residence for any of this stolen property is your surmise--

* * *

BY MR. MCINTYRE:

Q --that it be there.

A For the stolen property or what was included to be searched for in the search warrant?

Q Well, I'm taking them one at a time. The stolen property.

A Well, I woulda searched the house for the stolen property--

Q Okay.

A --yes.

Q And the basis for doing that isn't anything anybody told you about where that stolen property was located on the Wolfe premises, was it? You've just said nobody told you there was anything in the house.

A No, they did not tell me there was anything yet in the house there.

* * *

Q And did I understand you say a moment ago you took it upon yourself to unload any guns in that gun vault that might have been loaded?

A Well, I took it upon myself to be safe and secure. They were--Det. Westendorf was there as well. Many weapons that were loaded, we were obtaining the numbers and the makes and the models. We're certainly not gonna handle all those weapons loaded. We did unload those weapons, yes.

Q So, you had concluded at that point you were going to handle these weapons even before you called Assistant Prosecutor Garber to ask him whether or not you could in fact seize those weapons.

A Absolutely not--

Q Didn't you--

A --that's not true.

Q --just say that you weren't going to handle them?

A That's not true.

Q You testified a moment ago you didn't know whether or not Ron Wolfe had a federal firearms license, did I understand that correctly?

A No. You didn't

Q I thought you said that all you knew was that he was a dealer and didn't know whether he had a license. Did I misunderstand that?

A I understood him to be a federal--a licensed federal firearms dealer. I didn't know what class. There are different classes of federal firearms dealers.

Q And did you before December 19th know that there were separate classes of federal firearms dealers?

A Yes.

Q And did you know what rights, if that's the right word, or what types of weapons the various classifications a federal firearms dealer could possess?

A I had an idea. Specifically, I didn't have the law with me to indicate which types of weapons were illegal for which dealers, no.

Q Did you have in your mind based upon what you described yesterday as information from detective--I'm sorry form Special Agent Evans about the necessity for registration documents. Did you have in mind what type of documents Mr. Wolfe's federal

registration or license entitled him to have in that safe?

A No.

Q So you couldn't, for example, looking at the wall and seeing a machine gun or any kind of gun, you couldn't know at that point whether or not his license allowed him to have such a gun, could you?

A No.

Q And while we're at that, what did Special Agent Evans tell you that Mr. Wolfe should have by way of documentation in that gun vault in order to be in compliance with federal law?

A He didn't say anything about what Mr. Wolfe should have in the gun vault to be in compliance with federal law.

Q Well, one of the reasons you gave for seizing the weapons, guns from the gun vault was lack of adequate paper, a book I think you called it. if you didn't know what he had to have in order to validly possess these weapons in the gun vault, how could you conclude to seize some of those weapons based upon the lack of adequate books or adequate certifications?

A I knew from prior experience that if there are several weapons like that there should be a book. At least, that's what the feds have told me in the past.

Q Which feds? Mr. Evans?

A DEA, ATF.

Q DEA? Was telling you about federal firearm licensing requirements?

A The DEA knows about federal firearm licensing requirements.

Q And who in the DEA--DEA told you about what sort of *** books or documentation a federal firearms dealer of whatever class--

A A book--

Q --should have in his or her vault? What's the name of a DEA agent that told you about that?

A That would be Russ Neville.

Q Neville. He's where?

A He's at DEA in Detroit.

Q Still there?

A Reassigned to the electronics division.

Q He's still there.

A Yes.

Q When was it he told you about these classifications, or I'm sorry, about the requirement for books?

A A book.

Q A book.

A A long time ago. I don't know.

Q And, you had that--

A Evans--Evans has told me that. I'd been told that by deputies. I--I guess I don't know how to answer

your question, but I knew that--that a book had to be kept.

Q Do you know what the book was called?

A It was a ledger book listing the weapons. That's what I was looking for.

Q And did Mr. Evans or Mr. Neville tell you that that book had to be right within the storage area of the weapons?

A No.

Q So it was possible, was it not, that that book could have been down at the gun store down on--in Redford and still those weapons would be subject to the valid entry in a book, right?

A Yes. Yes.

Q But yet you, because you couldn't find the book in the gun vault, concluded that that was one of the basis upon which you could seize the guns--

A No, not--

Q --have I got the right?

A To be quite honest with you, the stuff with the--the federal considerations and all of that never really even entered my mind. The only thing that entered my mind was my call to Garber to see if he wanted me to seize these guns based upon the fact that I found this marijuana. That's what--that's what was goin' through my mind.

Now, after we had made that decision and during this long process of collecting these weapons and finally looking in the safe and I had said, I had made mention that there wasn't a book and that I thought that there was supposed to be a book, but that it could be elsewhere, that was a consideration.

Q Are you saying that this absence of paperwork was a consideration that you came up with after the seizure of the weapons had occurred, is that what you just said?

A Well, if you want me to say that one of the reasons for seizing the weapons has more weight than the other one, I'm not--

Q No, no--

A --sure.

Q --you're getting away from me, sir. I thought I just heard you say that the thing that really prompted you to seize the weapons was your call to Mr. Garber and the marijuana and that this business of lack of adequate records was something that you thought of later as a reason for doing something that you'd already done. That is, seize the guns, is that right?

A It wasn't foremost in my mind. It was there. But it wasn't--it wasn't the decision maker. It wasn't the final decision maker in what prompted me to seize the weapons.

* * *

Q Well, but the portion I just read says nothing about registration of firearms.

A That's in the same paragraph.

Q Yes, you then go on to say that Special Agent Evans has told you that Mr. Wolfe has a federal firearms dealers license, and you had verified he has registered firearms within Livingston County. Right?

A Yes.

Q Those allegations don't suggest anything illegal, do they, sir? In fact just the opposite, right?

A They don't suggest anything illegal.

Q And they didn't give you, for your understanding of the search warrant any authority to go in and seize weapons or anything else having to do with weapons, did they?

A I had no intention of seizing weapons when I went there.

Q You had no intention of seizing any weapons when you went to this house?

A From the gun vault, no.

* * *

Q And is it your testimony that when you went to the home, gained entry, you had no intention of seizing weapons.

A Well, that all depend on whether -- what the circumstances were by which they could be seized.

Q Like what? I mean --

A If the circumstances created --

Q What were your criterion when you entered the house that would allow you to go beyound what you had been authorized by the search warrant to do to seize a gun?

A Well, if something happened there, obviously - -

Q Somebody waved a gun at you.

A -- and did not -- yes.

Q Okay. That's fair.

A Things like that.

Q What else? That's one. Somebody pointed a gun at you, yes, obviously you could seize that gun becasue that's a crime and you can seize --

A A serial number on a weapon comes up stolen.

Q Did you have a list of the stolen weapons when you went into the house?

A No.

Q so there wouldn't be any way that that circumstance under which you seize a weapon could occur because you didn't have the background or the

information to check serial numbers against a list of stolen numbers.

A Well, you could radio that in easy enough.

Q But, you could, but you didn't, right? Or di dyou?

A Call the serial numbers? No.

Q And you didn't intend to do that.

A No.

Q Because you knew that search warrant didn't allow you to seize a weapon for that reason, right?

A Correct.

Q So what had to happen other than somebody pointing a gun at you per your understanding of this search warrant that would allow you to seize any guns?

A Well, when we find guns with dope and then we check with teh Prosecutor and he tells us that is a crime, I believe it's even a crime under the forfeiture act, then we are to seize, at his direction, those weaponse and that dope.

Q Okay. So as you went through the door you knew from your background or your believed from your background that if you found any dope you could seize every weapon in the house. Have I got that right?

A I usually in a case like that will seek legal advice from the Prosecutor.

Q So you didn't have any belief one way of the other as to how broad a seizure of guns could be if you found, for example, dope in one room.

A Well --

Q Is that right?

A -- I'm lookin' at guns and I'm lookin' at the search warrant, and guns aren't on the search warranct.. So, I'm thinkin' I have problem. I have dope here, though. And that changes everything.

Q Okay.

A That changes everything.

Q Now would you respond to my question? My question was, you believe that if in fact dope was found you could seize every gun in the house, isn't that true?

MR. ROSE: That was asked and answered, Your Honor.

MR. MCINTYRE: I don't think it was.

MR. ROSE: He said he consulted the Prosecutor.

MR. MCINTYRE: Well, now I'm asking for his belief.

THE WITNESS: Well again, that's what I would do. I would call the Prosecutor --

BY MR. MCINTYRE:

Q All right.

A --on that.

Q All right. So you didn't have any belief or background that allowed you to answer that question. From that can we safely conclude that Mr. Garber told you, go ahead and seize every gun you can find in this place?

A Yes, we did seize every weapon --

Q No, no. Not what you did. What did he tell you you could do?

A Seize all the guns.

Q Everything.

A Yes.

Q You're telling him at that point there were guns upstairs wholly apart from where this marijuana was in the --

A I believe I told him that there were guns in almost every room.

Q And he said take them all. That's your testimony, right?

A I believe so, yes.

* * *

Q And did that conversation also serve as your basis for seizing silencers or barrels for handguns as per Items 93 and 102 in Exhibit 3?

A These were part of the weapons.

Q They were part of another weapon or were they separate items?

A I didn't know.

Q I mean, you're there, you're taking them, right?

A Right, but I mean, I'm not an expert. I can't tell which barrel goes to which weapon. I couldn't tell you if they attach or not.

* * *

Q Okay. And were there any guns that you seized on the 23rd that you looked at afterwards in order to try to determine whether they were either stolen or in some fashion illegal?

A What I did was because I don't have a familiarity with guns, I couldn't tell you whether they were legal or not. I've only owned one gun. That's the one I carry.

Q Does that mean you seize some guns and later checked with somebody else to see if they were legal?

A Yes. I would call Randy Evans to look at guns. I'm not the gun expert.

Q Actually, you called him in on the 26th of December, did you not?

A I don't's recall when I called him. I can look it up if you wish.

Q I got it right here. Let me had you I think it's two pages marked as Defendant's Exhibit 8. Second page, paragraph two is what I'm--take your time, sir, read whatever you need to , but that's the paragraph I'm directing your attention to.

A Okay. It was on December 26th.

Q All right. Is it true that on December 26, 1996 three days after this search was conducted that you contacted Special Agent Evans of the ATF?

A Yes.

* * *

Q Is it true, Det. Perry, that on December 26, 1996 you contacted Special Agent Evans of the ATF:

A Could be.

Q Could be? You don't remember?

A Specifically on that date, no.

Q Do you remember shortly after the search that you contacted Special Agent--

A It was some time after the search I contacted him. I--

Q And do you recall that you--

A I'll trust him to say it was December 26th.

Q And do you recall that on that occasion that is shortly after the search that you asked for his assistance--

A Yes.

Q --in examining the firearms that had been seized from Mr. Wolfe's home.

A Yes.

Q What assistance were you requesting, sir?

A That he look at the firearms and run the numbers for me. He can get a better--

Q Run the numbers, you mean the serial numbers?

A Yes.

Q Were you attempting to find out whether or not any of these firearms that you'd seized on the 23rd had been reported as stolen?

A Well, that and I wanted to see if they were all registered to Ronald Wolfe.

Q To what?

A Ronald Wolfe.

Q You mean registered--

A To him--

Q --as part of his licensing?

A No, just registered to him.

Q Oh. I see. Okay. And what per your understanding what would be Special Agent--what's his name again, Evans, where would he go to learn that information, if you know?

A Well, he runs 'em through his office. They get a more extensive printout, a more accurate printout then I believe we do, so.

Q Okay. Do you recall that Special Agent Evans advised you that you couldn't be provided with any type of tax information about Mr. Wolfe?

A That's correct.

Q And did he explain why, or do you remember?

A No.

Q Okay. He apparently per this write up agreed to make a cursory inspection of the guns that you had seized from Mr. Wolfe's house on the 23rd, is that right?

A Well, yeah I had told him that some of the weapons looked a little funny. The pin guns I couldn't figure those out, so.

Q Well, actual--

A He said he would take a look at 'em and came in and did, and--

Q Actually you had told him before the search that you were expecting to see some guns at the Wolfe house, hadn't you?

A Well, I knew that there were gonna be guns there, obviously yes.

Q No, that isn't responsive to my question. Had you told Special Agent Evans that you were expected to find some guns at Mr. Wolfe's home?

A Specifically I don't recall whether I told him that or not. I probably did.

Q And did you tell him that you might, again before the search, did you tell him that you might be contacting him for some help in connection with guns that might be seized?

A No.

Q Okay. Had you concluded before the 23rd that you were going to do that if you found any guns?

A No.

Q Okay. What then was it that prompted you three days after the search to call Special Agent Evans? The appearance of the guns themselves or what was it?

A I'm not a gun expert. They looked funny to me. There was--there were a few guns there that I couldn't figure out. And to run all these guns I knew that he could do it a lot easier than I could.

He had told me--and he's always told me if you run across guns that you're not sure about, you know, if they look suspicious or otherwise or if you just can't figure out what they are--

Q Okay.

A --then give him a call.

Q And what specifically was it about guns seized on the 23rd that looked suspicious or funny to you, sir?

A Well, there were pin guns with no serial numbers on 'em.

Q What's a pin gun? Help me there. I'm as ignorant as about guns--

A Well, it looks like an ink pen, only when you pull the little clicker back, it fires--

Q Something.

A --a round.

Q Okay. And how many federally registered firearms dealers had you conducted a search upon in terms of their residence or storage areas prior to December 23rd, 1996? Any?

A I don't think so. I know that I probably did, but not knowing whether they were FFL's or not.

Q FFL meaning federal firearm license?

A Federal firearm license, right. A lotta people are, I just don't know whether they are or not.

Q Okay. And is it correct that you allowed Special Agent Evans to field test some of these weapons that you had seized from Mr. Wolfe's house on the 23rd?

A I allowed him to examine them.

* * *

Q But the ATF people were being contacted in connection with potential firearms violations prior to this affidavit, weren't they, sir?

A Well, basically I told Agent Evans, and I told Garber this as well, that--well, Agent Evans told me that if I see somethin' funny there, somethin' that looks--

Q Funny in respect to firearms?

A Funny in respect to firearms, should I see something funny. Any I don't know the exact word he used, but--

Q Let me know, that's the message?

A Well yeah, he says that I can let him know.

Q What--

A That's his investigation, though, not mine. And probably the way I view this now, it certainly wasn't a larceny or fraud crime--

Q Okay.

A --that I--and I'm unaware that he was investigating a larceny or fraud crime.

* * *

Q All right. And did you at that time in your mind characterize this as a marijuana growth operation for purposes of resale or personal consumption or did you draw either distinction?

A Either.

Q And did you identify any specific gun either in the gun vault or in the home that you attributed to or associated with the marijuana paraphernalia or growing objects that you seized from the gun vault?

That was a lousy question, let me try it again.

A I'll say no.

Q Well, don't--let me try it again. Did you associate any--any firearm that was seized from the house directly to be related to the marijuana growth operation?

A Well, I felt in my mind that that was a legal question. That's why I called Garber in the first place. It wasn't for me to determine whether or not these guns were connected to the dope. That may require an entirely different and lengthy investigation.

Q Right.

A So.

Q So the answer to my question is you didn't one way or the other associate--

A No.

Q --any weapon with the marijuana growing in the materials.

A Not any particular weapon, no. There weren't any weapons in with the marijuana, if that's what--

* * *

**STATE OF MICHIGAN**
**44TH JUDICIAL CIRCUIT COURT**
**(LIVINGSTON COUNTY)**

**CASE NO. 99-9961-FH:**

**THE PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***
**vs.**
**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

**CASE NO. 99-9962-FH:**

**THE PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***
**vs.**
**MARIE ELIZABETH WOLFE,**
***Defendant.***

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# MOTION TO QUASH

VOLUME III

TAKEN BY VIDEO TAPE RECORDING

**BEFORE THE HONORABLE DANIEL BURRESS,**
**CIRCUIT JUDGE**

Howell, Michigan - Wednesday, February 11, 1998

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* * *

A That is not included. I believe that this information did come from Harold Van Patten.

Q What information?

A Well, the information that you speak of this sentence about Ron Wolfe and Ron Wolfe, Jr. told him that they took the shingles.

Q Your testimony then is that Mr. Van Patten told you that Ron Wolfe, Sr. and Ron Wolfe, Jr. both told him that they had stolen these shingles and you didn't write it down? Is that your testimony?

A To be honest with you, I don't recall that statement. He may have--

Q You put it--

A --made that statement.

Q --in the affidavit.

A He may have made that statement to the

Q You were there.

A No, not--the Prosecutor had talked to Harp and Van Patten both at the same time. And there were a lot of statements made at that particular time. I didn't write those statements down.

They did end up in the affidavit. But, I don't recall--

Q Well, if you never heard--

A --him making that statement. I can only assume that it did come from him. It's half right.

Q If you never heard Mr. Van Patten say to Mr. Garber and he didn't say to you that Ron Wolfe, Sr. had admitted stealing the shingles, why did you sign an affidavit that alleges that?

A I missed it. It was just poor judgment on my part and not going further in detail word for word into the affidavit.

* * *

Q You made no allegation they were there and yet you were searching for golf cart records pursuant to this search warrant, correct?

A You asked me if--okay. What specifically are you asking me regarding the records of the golf carts?

Q I first asked you, I thought, whether there was any allegation in the affidavit if any golf cart record or receipts or any documents relating to golf cart were in the house or anywhere in the Wolfe premises. And I thought you answered that that's correct.

A There were no specific allegations that they were there.

Q All right. And you had no idea that they were there--were any there, did you?

A No, I would not have.

Q Yet you searched for such records--

A Yes.

Q --as part of and pursuant to this search warrant, didn't you?

A Yes, pursuant to the investigation. That's correct.

* * *

Q Okay. Nobody told you, including both Van Pattens and Mr. Harp that they were aware that any insurance contracts or claim forms or any documentation with respect to this belief that you had about a phony insurance claim existed anywhere on the Wolfe premises, did they, sir?

A Well, other than the state police report that I dug up.

Q State police report that you dug up when, sir?

A Around that time.

Q Did it say that there were some documents regarding this phony insurance claim on the Wolfe premises as--

A No, it supported what they were saying about the reported theft. With weathervane windows and so forth, lumber.

Q You didn't describe that document in the affidavit at all, though, did you, sir?

A No.

Q Okay. But back to my question. Did you have any information from anyone that there would be any records related to this claim on the Wolfe premises as of December 19, 1996?

A That the items would be on the Wolfe premises? I'm sorry.

Q No, documents.

A No.

* * *

Q I don't want to argue with you. Nobody had told you that as of December 19th that any such records were at the Wolfe premises--

MR. ROSE: Your Honor, that question was asked and answered this morning already a number of times.

MR. MCINTYRE: Your Honor--

MR. ROSE: We're now going through the summary phase--

MR. MCINTYRE: Yes.

MR. ROSE: --of his examination, which has gone on now into the third day. I object.

MR. MCINTYRE: Your Honor, one point in this transcript I'd like to have a summary of his statements. And I believe the record will reflect that nobody told him that any of the records--

THE COURT: I'll take the answer.

BY MR. MCINTYRE:

Q Do you remember the question, Mr. Perry?

A It was about insurance records including contracts.

Q Yes, sir. Whether anybody had told you--

A I don't know.

Q Okay.

A I know that I didn't have any knowledge that there would be any there.

Q All right. As regards claim forms and payment forms, same question. Anybody tell you or did you have any personal knowledge that any such documents would be on the Wolfe premises as of December 19th?

A If anybody told me, I don't recall it.

Q All right. Bales of hay. Mr. Van Patten told you that in August a quantity or a number of bales of hay were taken to the Wolfe premises, fair?

A Fair.

Q He didn't tell you whether any of those were still there, is that fair? Any of those bales were still there.

MR. ROSE: Can I just interpose an ongoing objection that we've already covered all of this? It's been asked and answered. I understand the Court's going to allow him to make a nice summary

for whatever appellate purposes he's doing this, but--

MR. MCINTYRE: Hopefully not appellate, but.

THE COURT: Go ahead.

BY MR. MCINTYRE:

Q Is that right, Mr. Perry?

A I was not told on the 19th that hay was there, no. The 19th of December, 1996.

Q Well, then you weren't told when you talked to Mr. Van Patten in December prior to the 19th that any was still there were you?

A [no verbal response]

Q Your answer was nobody told you on the 19th, I want to make sure--

A I did not verify, no, exactly that it was there? No. They only suggested that it was there.

Q Who only suggested that it was there?

A Van Patten and Mr. Salmon.

Q Mr. Salmon told you that he had seen--

A No, no. I said suggested by--I guess they were timing out its use and whether anyone could use that much hay in the time--or by the animals that they had, there should be some left.

Q Is it your testimony you had a conversation with Mr. Salmon wherein he told you how many animals on the Wolfe farm consumed hay, how much they consumed and at what rate the 200 or so bales that were taken in August would not be used up by December?

A No, Van Patten stated that.

Q He did. Did you make a write up of that?

A No. No.

Q Okay. Golf carts, that's what's in the search warrant.

A Yes.

Q Did you have any information there were golf carts plural on the Wolfe premises as of December 19th?

A Only the previous information I had received from--

Q Mr. Harp and the photograph from Mr. Van Patten, right?

A Mr. Van Patten had seen the carts. He also produced the photograph, yes.

Q He'd seen multiple carts? He told you that?

A Van Patten?

Q Yes, sir.

A Oh, I don't remember whether he told me he'd seen two carts. Probably did.

Q Not part of your write up--that was not part of your write up.

A Regarding the carts?

Q Multiple carts.

A No.

Q Okay. Records relating to building materials for structures on the premises. Nobody told you that any such records were on the premises anywhere, did they, sir?

A No.

Q Shingle samples. Anybody tell you there were shingles to be sampled on the Wolfe premises?

A Not on that--

Q Pardon me?

A --at that time, no.

Q Wait a minute, I thought you said that Mr. Van Patten had told you that some shingles arrived from 5110 Clyde and I think it's Clyde Street nearby. And that Mr. Van Patten at some point had told you that Mr. Wolfe, Sr. and Jr. and Culbert admitted taking them.

A You asked me if I knew that there were shingle samples there.

Q Uh-huh.

A On December--

Q And your answer's no.

A --the 19th. My answer is that I did not see on the 19th shingle samples on Mr. Wolfe's property so how could I possibly say anything but no?

Q Well, I'm really testing what you had been told prior to the time you got to the premises.

A Well, okay. Then obviously Mr. Van Patten stated that there were--that those shingles had been installed and that there were--

Q All right. All right. Were any samples of those shingles taken on the 23rd?

A The sample of the bag, the lot was taken on the 23rd.

Q Of shingles?

A Yes.

Q And that included some shingles. I mean, not a bag.

A No. No.

Q Exhibit 3, what number did the bag of shingle samples get, if you can recall? I don't expect you've committed it to memory. Do you recall at all?

A No.

Q You're telling me that some--a bag that appeared to have contained some shingles was seized as part of the seizure on December 23rd.

A Yes.

Q And that came to you and became part of your list.

A Yes.

Q Okay. Building material samples. Again, your information with respect to that was Mr. Van

Patten's testimony or Mr. Van Patten's statement about the OSB board and lumber and that sort of thing?

A Yes.

Q Anything else? Any other factual underpinning for that conclusion and the request to seek that sort of material in this search?

A Well, that I suppose building materials samples would apply to possibly the shingles as well. But no, as far as seizure.

Q Okay. You asked the judge to give you authority to seize photographs. See that?

A Yes.

Q Photographs of what?

A Of the premises that we were on. Oh, seizing--

Q You're asking for permission--

A Seizing photographs?

Q Well, that--right.

A I'm sorry, we've got the reverse going here. No. Those would be photographs of anything that would match the stolen items we were looking for.

Q Well, let me be clear. You were asking for permission to photograph when you went on the property, or were you asking for permission to seize photographs which were already there?

A Photographs that were already there.

Q Okay. And what information did you have that there were any photographs on the Wolfe property as of or prior to December 19, 1996?

A I don't recall being told that there were photographs on the premises of specifically the stolen material.

Q Or of anything really, were you told that there were photographs of anything?

A Well, I can't be sure of that. Probably not.

Q Okay. And you certainly weren't looking to go in and take family photographs or stuff like that--

A No.

Q --right? Okay. Records relating to the purchase, ownership, registration of firearms. We've covered that.

A Yes.

Q Don't need to go back through that one. Records relating to the possession, ownership or registration of vehicles. What information did you have that any such record would be on the Wolfe premises as of December 19?

A I did not.

Q And what--

A Other than--

Q --evidence of ownership of vehicles be of any criminal act or have any nexus to any criminal acts?

Or why were you asking to look for evidence of ownership or registration of vehicles?

A There was evidence that vehicles, pick-up trucks had been used. This was--

Q Did--

A There were tire tracks--

Q Okay.

A --of vehicles that had been used.

Q You didn't ask for permission to seize vehicles.

A To seize vehicles? No.

Q And you didn't ask for permission to photograph vehicles as part of this search.

A No.

Q Correct? And had you checked with the Secretary of State under the name Ron Wolfe, Sr. to see if any vehicles were registered to him at that address before this search warrant was sought and executed?

A I don't recall.

Q Records or evidence relating to horse ownership. What information did you have that any such records would be on the Wolfe premises as of December 19.

A Other than what I was told about the horses have any direct knowledge that there would be regarding--or relating to horses.

* * *

Q Well, you were told--

A On the premises.

Q --that he boarded horses there.

A Yes.

Q Right? You were not told that he had any documents that indicated ownership--yes, horse ownership, correct?

A No, I don't believe so.

Q All right. Finally, you asked for and got permission to search for and seize sales or veterinary treatment. I assume that really relates back to horses--

A Yes.

Q --I probably cut that short. And you didn't have any evidence that there were records relating to horse sales or vet treatment, either, did you, sir?

A [no verbal response]

Q As of December 19th.

A No. I don't believe so.

* * *

Q And where is she maintained in the house while you are doing your search? Were you present--well let me back up.

Were you present when Mr. Wolfe was taken away by one of your officers?

A Yes.

Q Leaving Mrs. Wolfe there in your presence--

A Yes.

Q --along with other officers.

A Yes.

Q All right. And how many officers are there collectively at this point?

A Roughly seven.

Q Seven or eight of you?

A Depending, well--

Q All right.

A --you talking about road patrol or the entire complement of people?

Q How many are in the house?

A Approximately seven.

Q All right. Might have been others outside some place?

A [no verbal response]

Q All right.

A Well, I think we had about seven there total.

Q All right. So most of them are in the house with you.

A At that particular time, yes.

Q All right. And, you--you re obviously there to do a search of the premises, right?

A Yes.

Q And you begin to do that?

A [no verbal response]

Q How long after Mr. Wolfe's departure to you begin your actual search process, you yourself?

A Well, I gave the necessary papers to Mrs. Wolfe, sat down in the living room and read those.

Q You did or she did?

A She sat down and read those.

Q All right.

A So, it was a few minutes probably after that that I began.

Q All right. And before you began searching did you give directions to any of the other officers that were present with you in the house to do certain tasks or anything like that? Divide up the house or anything like that?

A Well, as we usually do, Ed Moore would have taken me photographs as he usually does.

Q Sure.

A Det. Luzod, I don't know whether I told him to or whether he said that he would handle the upstairs, or I guess that level and upstairs--

Q All right.

A --and then I would handle the basement and I think at that point Swackhammer went to the outside.

Q All right. And that still leaves a couple officers, doesn't it?

A Well, you have a transport officer removed--

Q Okay.

A --with Mr. Wolfe.

Q All right.

A The other officer I believe it was Hawry was there to maintain security, perimeter security.

Q Okay. Inside or out?

A He wasn't--that would be--well, it depends what I told him to do. Sometimes he was in, sometimes he was out.

Q All right. And who had the assignment to be with Mrs. Wolfe?

A Well initially I believe that that was Hawry and then after that Luzod was--Det. Luzod was with her for a great deal of time. And then I believe Det. Sgt. Swackhammer--

Q Okay.

A --spoke with her for a great deal of time.

Q All right. And those officers were with her for what reason? What reason were they--

A Well, during a search warrant we don't want people movin' around. We have a policy.

Q Okay.

A Most of the time--

Q All right.

A --most all of the time we'll set them in the living room on a couch somewhere.

Q It's a control situation, isn't it?

A It was a control situation, however it was a little bit more lax there than--than others I've encountered.

Q Right, but she wasn't really in all honesty, she wasn't free to follow you around and see what you're doing. Or were going to do. She wasn't able to do that, was she?

A I don't believe she ever asked to, but I don't think that she was. I--

Q Well, she wasn't, was she?

A No, I don't think so.

Q No. When you--if you go into search whether it's the Wolfe residence or any other residence and there is an occupant in the house and it's Don Martin's house and you're there to search my house. And I'm there and I say okay, but I'm gonna follow you around, Officer. And I'm gonna watch what you do and I'm gonna see what you take. You don't permit that.

A Not generally, no.

Q No. You're going to tell me kindly or politely, go have a seat. And if I don't stay there you're

probably going to put somebody with me, just to make sure that I do stay where I'm at, right?

A No.

Q No? All right.

A I'm gonna tell you to go have a seat, and I'm probably gonna put somebody with you whether you stay there or not.

Q Okay. All right. That's what I kind of guessed. And that was again so that you had control of the premises and that you weren't going to have any so to speak interference or anything like that while you went about your duties pursuant search warrant. Whether that takes 10 minutes or 10 hours, that's the job that had to be done.

A Yes.

* * *

Q I thought I heard testimony earlier that you removed those because someone from one or more of those departments told you that they didn't want him to have them.

A Prosecutor Rose told me to give the badges back. I gave the badges back.

Q I see.

A Irregardless of what any other department wanted or didn't want.

Q Bales of hay? Are they still there?

A No. Returned to owner on the day of the search.

Q How about the four by eights, the O.C.--OSB or whatever.

A OSB is marked returned to owner.

Q Okay. There were a lot of weapons that were taken. Do you have all of the weapons still in your possession?

A Yes.

Q Every single one of them?

A Yes.

Q None of them have been given over to AT and F?

A ATF?

Q ATF, excuse me.

A Yes. They removed--

Q All right. So you don't have--

A --some.

Q --all the weapons.

A Well, no, ATF is holding some weapons.

Q And do you know how many weapons were turned over to them by you?

A I'd have to count 'em up. Approximately 20.

Q All right.

A Twenty-five.

Q Out of how many total, sir, roughly?

A A hundred, roughly.

Q Or more. So you--

A Or less.

Q Okay.

A You're asking me to guess, I'm guessing.

Q All right. So we got at least maybe 80 over there, give or take a few.

A Give or take.

Q All right. And that was in December of '96 and what are those weapons being held for now that aren't in the possession of ATF?

A The Prosecutor tells me when to release and when not to release. The Prosecutor is holding those weapons.

Q And do you know why the Prosecutor is holding those weapons?

A I would assume because they--assume that they were involved in crimes such as the manufacturing of marijuana and that falling in with the forfeiture laws and so forth.

Q Excuse me?

A Those falling in with the forfeiture laws regarding weapons and dope.

Q I thought, though, that you took these guns on December 23rd, 1996. Correct?

A Yes.

Q Isn't there some sort of time requirement or some to file--have you filed any forfeiture actions?

A No.

Q Has the Prosecutor filed any forfeiture actions?

A I don't know.

Q Okay. Do you know if these weapons are illegal at all?

A I suspected that some of them might be, but I wasn't sure.

Q Well, you've had them all this time period. Have you checked them out to see if they were stolen or anything like that?

A Yes.

Q Are they?

A Two are.

Q Two.

A Yes.

Q And, what about the other 70-some are legitimate weapons to the best of your knowledge?

A That's what I was told by ATF.

Q All right. And who--just out of curiosity, who told you that you could release weapons in your custody held by you, who gave you the authority to release potential evidence items to the ATF?

A Who told me to do that?

Q Yes.

A The ATF.

Q So when--

A The Prosecutor didn't tell me to do that.

Q When the ATF says I want things you've got, you just hand them over. Is that a fair statement?

A If it's--

Q I mean assuming that you're going to get a receipt for them, but.

A If it's possible to do so, yes.

Q So you weren't served with any kind of court order or anything like that directing you to do that.

A They weren't seized from me by any federal agency.

Q You gave them to them.

A Yes.

* * *

Q All right. Without any legal request in writing or anything like that directing you to do it.

A That's correct.

* * *

Q All right. And could you tell us why it was that you called Mr. Garber? Was there some sort of problem that you perceived there with these guns and marijuana that you all of a sudden needed some sort of legal advice on?

A It's not uncommon, and I would probably do this as just a matter of course to call a Prosecutor if I have inadvertent discovery of something that is not contained on the search warrant.

Q All right. And so you called him because inadvertent discovery.

A Yes.

Q All right. Now you also mentioned something about a second search warrant. Are you familiar with that term as we use it in legal circles? And what a reference to a second search warrant would mean? Essentially--

A A second search warrant for the premises--

Q Right.

A --that I was on--

Q Right.

A --serving the search warrant, yes.

Q Right, you go in, you got a search warrant, you find something, you back out, go back to the judge, incorporate the first search warrant, tell him what you found, go back in.

A Yes, I'm familiar with that.

Q Why didn't you do that in this case?

A Well, after speaking-with the Prosecutor I was advised that I had enough to seize the growing operation.

Q So, you relied solely on his determination.

A Well, yes, that's what we do.

Q Yes. I recognize that. Okay. But you certainly had more than enough ample time to go get a second search warrant, no question about that.

A Yes.

Q I mean there wasn't any danger to lose evidence or people flushing things down the toilet or burning the hay in the barn or anything like that. You guys had total control. And it was just a matter of going back to the magistrate and getting it, if you needed to do that.

A If I needed to do it, yes.

* * *

Q Okay. And Mr. Rose got into a question about would you have let these loaded guns there in the vault sit there after you saw them? And your answer was no because you wanted to protect the public. Do I understand that correct?

A Well, there's an issue that comes up when you have weapons in proximity to dope. As I've said before many times during this two and a half days of testimony--

Q Mmm hmm. What's the issue?

A --and I believe that it's illegal to possess those weapons with that dope.

Q You have to conclude, do you not, that the weapons are there to in some fashion facilitate the illegal dope, right?

A Yes.

Q You were in a gun vault of a person you knew had a federal firearms license, right?

A Yes.

Q And is it your testimony that you concluded that those guns you saw in the gun vault were there to protect the 17 plants or whatever it is of marijuana? Or did you know?

A At the time?

Q Yes.

A Well, I didn't know that the marijuana was gonna be there.

Q No, I mean after you saw the marijuana. Did you immediately conclude that all of these guns in the gun vault were there to protect it?

A Well, I couldn't make that determination--

Q That's why you called.

A --it was unusual they weren't in cases. They weren't empty, they were all loaded. One sat next to the door, this assault rifle looking weapon.

Q Mmm hmm. So, what's the answer to my question? You concluded that they were there to protect the dope or that they were there because Mr. Wolfe was a registered federal firearms dealer?

A Well, they could have been. I believe that there was probable cause to believe that they were there to protect the dope.

Q Mmm hmm. Based on what?

A I didn't know what type of license again, That Mr. Wolfe had.

* * *

BY MR. ROSE:

Q And any items that were, other than the marijuana that are per se unlawful to own, were any such items found in the gun vault?

A Well, I found silencers. Zip guns. Items like that in the vault.

MR. ROSE: No further questions.

THE COURT: Cross.

REDIRECT EXAMINATION

BY MR. MCINTYRE:

Q Per se illegal, Mr. Perry, what is your basis for saying that a silencer or--you say a zip gun or are we talking about the pen guns you--

A Pen--

Q --described already?

A Pen guns.

Q Is it your legal conclusion that they are per se illegal to own?

A Well--

* * *

THE WITNESS: They are illegal to own or possess if you don't have the proper license--

MR. MCINTYRE: --All right.

THE WITNESS: --or if they don't have serial numbers attached I believe.

BY MR. MCINTYRE:

Q Did you make that conclusion as you seized them or not?

A The pen guns had no serial numbers.

Q What--

A The silencers, some had numbers.

Q Did you draw any distinctions between the ones that had numbers and the ones that didn't?

A On the silencers?

Q Yes.

A No.

Q You just picked up everything that looked like a weapon because of what Prosecutor Garber said you could do because there was marijuana there, isn't that true?

A Well, that's what I decided to do. The silencers, if--obviously the license was appropriate for a person to possess silencers then those would have been returned.

* * *

**STATE OF MICHIGAN**
**44TH JUDICIAL CIRCUIT COURT**
**(LIVINGSTON COUNTY)**

**CASE NO. 99-9961-FH:**

**THE PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***
**vs.**
**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

**CASE NO. 99-9962-FH:**

**THE PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***
**vs.**
**MARIE ELIZABETH WOLFE,**
***Defendant.***

# MOTION TO QUASH

VOLUME IV

TAKEN BY VIDEO TAPE RECORDING

**BEFORE THE HONORABLE DANIEL BURRESS,**
**CIRCUIT JUDGE**

Howell, Michigan - Monday, February 23, 1998

**APPEARANCES:**

For the People:

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For Ron Wolfe:

MR. KENNETH G. MCINTYRE (P17449)
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## DIRECT EXAMINATION

BY MR. MCINTYRE:

Q. Mr. Garber, what do your do, sir?

A. I'm chief assistant prosecutor here in Livingston County.

Q. And how long have you held that position?

A. Since '88.

Q. And I think we all know, but for the record what generally are your duties in that regard?

A. Administering the office, you know, in all aspects of criminal prosecution.

Q. Do your duties include the preparation for affidavits in--in the request--in requests for search warrants?

A. Yes.

Q. And, do your duties include actually preparing the affidavits themselves?

A. Yes, it's a--it's one common Supreme Court form.

Q. And I--silly question Number 101, but I assume you do not type them, you simply provide the information to be typed to someone else.

A. Correct.

Q. Okay.

A. I type 'em on weekends if no one's available, but generally the clerical staff does a better job.

Q. Okay. Do your duties include the preparation of returns which are filed after the search has been completed?

A. No.

Q. Who does that?

A. The investigating officers.

Q. And are they instructed by you on how to do that or have they been or--

A. No.

Q. --figure they know.

A. No.

Q. Okay. How long have you been preparing affidavits and search warrants, Mr. Garber?

A. Well, since 1993.

Q. Okay. Do you use some sort of manual to assist you in complying with whatever requirements might be there for the preparation of affidavits and/or search warrants?

A. No.

* * *

Q. Specifically, Mr. Garber, you did not ask the judge for permission to search for or seize any firearms. Have I read that paragraph too correctly?

A. Yes, I guess so. That was probably an--I don't see firearms listed specifically. That was probably an error on my part.

Q. You thought that this search warrant authorized officers to search for firearms? Is that what you just said?

A. No, that's what I wanted them--I should of been more specific. Although arguably records relating to the purchase, ownership or registration of firearms would include the firearm itself.

Q. It would?

A. Sure.

Q. What--

A. I mean it's physical evidence.

* * *

Q. You intended to have this search warrant authorize the officers to search for and seize guns then, have I understood you correctly?

A. Yeah, that would of been my intent. Subsequently, it didn't make any difference.

Q. It's part of why we're here. Okay. What information then, back to the question, did you have that there would be any records relating to the ownership or registration of firearms in the Wolfe

residence as of the time this search warrant was issued?

A. I think the law requires that you maintain 'em.

Q. Was--did you have an understanding of what records a federal firearms dealer has to maintain?

A. I'm familiar--

Q. Or--

A. I'm familiar with that, but I guess I'm thinking more along the lines of, you know, myself, I have firearms in the house and it's just another common example, you're gonna have your pistol registrations. You're gonna have, you know, keep the bills and receipts in case you have to have any warranty work done.

It's just--you're nit-pickin' here on stuff that it doesn't make any sense to me.

Q. All right. Back to my question. Did you as of December 19th have an understanding of what registration or ownership records a federal firearms dealer has to maintain?

A. I had an understanding, yeah.

Q. What was that understanding?

A. Well, you gotta maintain all records of purchases and sales.

Q. All right. And was it you understanding that the federal firearms dealer has to maintain those records in his home or on his premises?

A. I'm not sure about that.

Q. So, you didn't know.

A. No.

* * *

**STATE OF MICHIGAN**
**44TH JUDICIAL CIRCUIT COURT**
**(LIVINGSTON COUNTY)**

**CASE NO. 99-9961-FH:**

**THE PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***
**vs.**
**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

**CASE NO. 99-9962-FH:**

**THE PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***
**vs.**
**MARIE ELIZABETH WOLFE,**
***Defendant.***

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# MOTION TO QUASH

VOLUME VI

TAKEN BY VIDEO TAPE RECORDING

**BEFORE THE HONORABLE DANIEL BURRESS,**
**CIRCUIT JUDGE**

Howell, Michigan - Wednesday, February 11, 1998

**APPEARANCES:**

For the People:

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For Ron Wolfe:

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(517) 372-7780

THE COURT: May he be excused?

MR. MCINTYRE: Yes. Thank you.

THE COURT: Thank you.

DET. SGT. SWACKHAMMER: Thank you, Your Honor. Thank you for your consideration this morning.

* * *

HAROLD VAN PATTEN

called by the defense at 2:22 a.m., sworn by the Court, testified:

THE WITNESS: You realize I'm hard of hearing?

THE COURT: I do. I'm getting something for you right now. We've done this before.

* * *

A. No, I didn't use all the OSB board to build the barn, When I was over that at that property there was still OSB left over in the barn.

* * *

Q. All right. And did you--

A. Long.

Q. --Det. Perry what anybody had told you about where that OSB board and two by four's and nails had come from?

A. Yes, I did.

Q. What did you tell him?

A. He ask--he asked me--'cuz I told him that Ron Wolfe said that Junior and Richard had got the OSB board down from somewhere off of Old U.S. 23.

Q. Okay. Did you tell Det. Perry anything else about where Mr. Wolfe, Sr. had told you that stuff had come from?

A. No, other than that--other than he told me that Junior and Richard got it from somewhere down on Old U.S. 23.

Q. Okay. Do you remember testifying back in September that Mr. Wolfe never told you that those materials were stolen?

A. Do I remember testifying that he never told me that they were stolen?

Q. Yes, sir.

A. No, I do not. 'Cuz I didn't.

Q. Pardon me?

A. I didn't. I never testified that.

Q. You testified that Mr. Wolfe--

A. That Mr. Wolfe told me that stuff was never stolen. No, I did not.

Q. Did Mr. Wolfe ever tell you that they were stolen?

A. Yes, he did. He told me it was stolen. He told me Richard and Junior--he told me Junior and Richard got the stuff from some place down on Old U.S.23.

Q. And did he tell you that they had stolen it?

A. Well no, he didn't say that they stole it.

Q. He simply said they had gotten it somewhere.

A. Yeah.

Q. And, did Mr. Wolfe, Sr. tell you that he had stolen it?

A. No, he did not say he was involved in it at all.

**STATE OF MICHIGAN**
**44TH JUDICIAL CIRCUIT COURT**
**(LIVINGSTON COUNTY)**

**CASE NO. 99-9961-FH:**

**THE PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***
**vs.**
**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

**CASE NO. 99-9962-FH:**

**THE PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***
**vs.**
**MARIE ELIZABETH WOLFE,**
***Defendant.***

# MOTION TO QUASH

VOLUME VIII

TAKEN BY VIDEO TAPE RECORDING

**BEFORE THE HONORABLE DANIEL BURRESS,**
**CIRCUIT JUDGE**

Howell, Michigan - Wednesday, March 18, 1998

**APPEARANCES:**

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For Ron Wolfe:

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* * *

Q. Okay. All right. And by the way did she allow you to make a phone call to Mr. Johnson or any lawyer at the time she came to your cell to tell you that Det. Perry wanted the combination to a safe?

A. I was refused all day long to make any phone calls whatsoever or to talk to anybody until I was arraigned.

* * *

RONALD WOLFE, SR.
recalled by the defense at 11:14 am., previously sworn by the Clerk, testified:

DIRECT EXAMINATION CONTINUED

BY MR. MCINTYRE:

Q. Mr. Wolfe, I think I was asking you about the first conversations that you had with Mrs. York. And did I understand it correctly that you made reference to wanting to talk to an attorney during that conversation?

A. Yes.

Q. And what was her response to that request?

A. Not right now, later.

* * *

Q. If they blew the door, they were going to get in the room anyway, weren't they?

A. I don't know if the room would be there if they blew it.

Q. I guess I still--how--how was it incriminating what--you giving up the combination?

A. Because I knew that there was marijuana in there, and I knew that I would be in trouble.

Q. How would your statement of the combination incriminate you?

A. 'Cuz that's the only way they were gettin' in there without blowin' it.

* * *

**STATE OF MICHIGAN**
**44TH JUDICIAL CIRCUIT COURT**
**(LIVINGSTON COUNTY)**

**CASE NO. 99-9961-FH:**

**THE PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***
**vs.**
**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

**CASE NO. 99-9962-FH:**

**THE PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***
**vs.**
**MARIE ELIZABETH WOLFE,**
***Defendant.***

---

# MOTION TO QUASH

VOLUME VIII

TAKEN BY VIDEO TAPE RECORDING

**BEFORE THE HONORABLE DANIEL BURRESS,**
**CIRCUIT JUDGE**

Howell, Michigan - Wednesday, March 18, 1998

**APPEARANCES:**

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***

Q. And in that procedure what was the order of the swearing of the affiant and your reading of the affidavit? Which came first?

A. Normally, and I only say normally because I've had my memory refreshed on this one, but normally the person that called is the person that would have signed the affidavit and I'd swear them on the phone.

Q. And would that be before you actually read the affidavit?

A. That would be before I read the affidavit, right.

Q. Now, on this instance it appears that the sate is December 19th of 1996.

A. December 23rd.

Q. Oh, I'm sorry, you're right. December 23rd.

A. Yes.

Q. Do you recall this specific search warrant request?

A. With the refreshment of my recollection, I do.

Q. Okay. And--

A. After I spoke--do you want me to tell you the whole story?

Q. That's fine with me. I can do it--

A. After I spoke to you and defense counsel I went home and at supper that night I discussed it with my

wife jane. And she said, oh, that was the building materials case. And I said, you remember that?

And she said, oh, yes. They came while you were in the shower in the morning, and they were very, very tired. And they wouldn't take any coffee. And, they sat in the living room and then you came in after you finished your shower and you did your business with them.

Q. Do you remember--do you have a recollection of who it was that came to your house?

A. I don't really. I can tell you what my wife says.

* * *

Q. Let me follow up on that.

A. Sure.

Q. My recollection is that Det. Perry testified that he brought it to your home in Hartland--

A. Well, he certainly--

Q. --on December 23rd.

A. He certainly did not do that.

Q. Okay. The--the affidavit and the search warrant in front of you dated--I'm sorry, timed 7:10 a.m. and 7:15 a.m. if I recall correctly.

A. That's right.

Q. What would of happened at 7:10 a.m., Judge Hegarty?

A. At 7:10 I would have signed and dated and timed it and would have read it. And after reading it I woulda then signed the warrant. After I found good cause.

Q. And the 7:15 a.m. on the search warrant would be representative of what, sir?

A. The time after I had read the affidavit, found good cause and decided to sign the search warrant.

Q. Okay. So, there--we know then precisely how long you had this affidavit in front of you--

A. Well--

Q. --before you signed it--signed the search warrant.

A. Well, give or take sure. Yeah.

Q. Okay. And was that your practice? To time when you got the affidavit and when you signed the search warrant?

A. For this type of warrant normally, yes, I think that's a--

Q. Now, this affidavit consists of six pages.

THE COURT: And I think you've got the mike covered.

THE WITNESS: I'm sorry.

Yes.

BY MR. MCINTYRE:

Q. Okay. Have you read that affidavit recently, sir?

A. Not since December of 1996.

* * *

MR. MCINTYRE: And, counsel, can we agree without forcing the Judge to read the entire affidavit that there's no mention in the affidavit that either Mr. Van Patten or Mr. Harp have been offered immunity from or promised they wouldn't be prosecuted for the statements?

MR. ROSE: The documents's in evidence. There's --

THE COURT: Do you want Judge Hegarty to have to read it all?

MR. ROSE: No, the document speaks for itself. He's not gonna find it if he reads it there, but he doesn't need my stipulation to that fact.

MR. MCINTYRE: Okay.

BY MR. MCINTYRE:

Q And, Judge, can we agree you weren't told of that fact orally --

A No. No.

Q And by that fact I mean that these men had been offered --

A I take very little from the police officers that come to my home with an affidavit or do it on the fax machine, it's gotta be in the affidavit. Now, I will reject them and tell them what I might need.

In other words, I'll tell them where it's defection. That is, that nowhere in the affidavit does it say

that anybody has every seen the material to be sought in the place to be searched.

Q Well, that was gonna be my next question. Were you made aware at the time -- we know what's in the affidavit. Were you made aware by any person or from any source that the home situated on the premises that this search warrant covers had -- excuse me -- had a gun vault, a locked gun vault in the basement of the home?

A I don't know. If it's not in the affidavit, I would not know.

* * *

Q. All right. Did you find--

A. What--let me explain that.

Q. Yes, sir.

* * *

Q. Judge, Judge I've now gotta ask you then to read the entire affidavit and tell where in the affidavit it is alleged that anything of a stolen nature could be found and had been seen in the home described as part of the entire premises.

A. All right.

MR. ROSE: Your Honor, I'm gonna object to that question, because we do get into the area of it being

argumentative. And, ultimately Your Honor is gonna have to make the decision.

THE COURT: I'm going to let him read it.

MR. MCINTYRE: It's now 10:45, Your Honor.

THE WITNESS: Well, I'm gonna read it a lot more carefully this time than I did in December 23rd of 1996, Mr. McIntyre.

MR.MCINTYRE: Thank you for that, Your Honor.

THE WITNESS: You're asking me, and I don't really think it's fair to have the person that issued the warrant cross-examined concerning the warrant. The warrant either is up or down based upon the affidavit and the warrant itself.

But, I don't--my lawyer is there in the room, but he didn't bring his coat today, so he can't object.

MR. MCINTYRE: Okay.

THE COURT: As you know, Judge, I have a tie that I give people that don't--

THE WITNESS: I understand. I assume that you wore it yesterday, Judge.

Yes, what's your question?

BY MR. MCINTYRE:

Q. Judge, in reading that affidavit were you able to see anywhere in there that the affiant alleged that any stolen materials or any of the objects that they asked

you to authorize them to search for had ever been in the home of Mr. and Mrs. Wolfe by--

A. That none of the stolen material was indicated to be in the home.

Q. Pardon me?

A. None of the material indicated to have been stolen was ever alleged to be in the home. The only things that would of been in the home would have been the documents or ownership of the premises.

Q. Okay. And it's true, is it not that there is no allegation in the affidavit that there would be any insurance records, claim forms, bales of hay, golf cars--I'm reading now from--

A. Thank you.

Q. --the property to be searched for and seized. Records relating to business materials for the structures on the premises. Shingle samples. All of that material described in Paragraph 2, none of those were alleged to have even been in the home. is that correct?

A. That's correct. There's no affirmative allegation that they were ever seen in the home.

Q. And therefore your warrant would not have authorized the officers to go into the home and search for those materials, there having been no allegation that they were even there, is that correct?

A. Well, taking the entire affidavit as a whole, I would assume that perhaps some of the material would probably be in the home rather than in an airplane hangar such as the ownership documents, the insurance records, the claims forms and the contracts.

Q. But there had been no allegation that any of these objects were in the home itself.

MR.ROSE: Asked and answered.

MR. MCINTYRE: No, he didn't answer that. He said it'd be more likely they'd be there--

THE WITNESS: No.

MR. MCINTYRE: --but I'm talkin' about what's in the affidavit.

THE WITNESS: What's your question?

BY MR. MCINTYRE:

Q. In the affidavit there is for example no allegation that insurance records including contracts, claim forms and payment forms had ever been seen in the Wolfe residence?

A. Well--

MR. ROSE: I object. That's been asked and answered. He went through the entire list of doc--of records three questions ago and asked if any of those objects were contained in the home of the affidavit. And he's already asked and answered.

THE COURT: I'm going to let him answer it.

THE WITNESS: Well, it's the same answer. No.

BY MR. MCINTYRE:

Q. Okay. All right. And in fact there was never an allegation contained in the affidavit that there would be any evidence or evidence indicative of ownership or occupancy of the above premises property in the home, correct?

A. Taking the affidavit as a whole, I would expect those documents to be contained in the home.

Q. Where in the affidavit is there any allegation that any of those documents--

A. Well, I assume that this in one premises. It's described as--

MR. ROSE: I'm gonna object, Your Honor, as to the argument--

THE WITNESS: And I really sincerely on my part as a judge object to being cross-examined concerning a issuance of a search warrant. I think it's highly improper.

Go ahead.

BY MR. MCINTYRE:

Q. Well, forgive me, I'm trying to protect my client's interests and--

A. I understand you are, and go ahead.

THE COURT: All right. We're gonna do it this way. I'm going to sustain that objection because the document speaks for itself.

THE WITNESS: That's--

THE COURT: That'll be argument when the time comes.

BY MR. MCINTYRE:

Q. Judge Hegarty were you available on the 23rd of December after 7:15 a.m. to review and issue a second search warrant had been presented to you?

A. I--whether I'm on call or not I'm usually available. I have no recollection of what I did after that.

Q. I thought you had gotten up, showered and were on your way to work.

A. Probably, what day of the week was it?

Q. That woulda been a Monday, sir.

A. Yeah, I woulda been on my way to work. Right.

Q. Okay. And really, whether you were on your way to work or not--

A. I would have been--

Q. --if you were the judge on call, you would of been available--

A. That's right.

Q. Okay.

A. That's right.

Q. And I assume that rotates among--

A. Yes, it does.

Q. --the district judges?

A. Right.

Q. Okay. And could we conclude from the fact they came to your house at 7:00 in the morning you were the man--

A. No, you can't conclude that--

Q. --the judge on call?

A. --sometimes the judge on call, his beeper doesn't work or things happen, and they go to any one of the judges. They even go to circuit court judges sometimes.

Q. Okay. All right. All right. And would it be fair to say in a general sense, Your Honor, that you rely upon--you relied upon the accuracy of the assertions in the affidavit in making your decision?

A. That's right. Nothing extraneous.

**STATE OF MICHIGAN**
**44TH JUDICIAL CIRCUIT COURT**
**(LIVINGSTON COUNTY)**

**CASE NO. 99-9961-FH:**

**THE PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***
**vs.**
**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

**CASE NO. 99-9962-FH:**

**THE PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***
**vs.**
**MARIE ELIZABETH WOLFE,**
***Defendant.***

# MOTION TO QUASH

VOLUME VIII

TAKEN BY VIDEO TAPE RECORDING

**BEFORE THE HONORABLE DANIEL BURRESS,**
**CIRCUIT JUDGE**

Howell, Michigan - Wednesday, March 18, 1998

**APPEARANCES:**

For the People: MR. DANIEL W. ROSE (P40459)
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For Ron Wolfe: MR. KENNETH G. MCINTYRE
(P17449)
Sinas, Dramis
520 Seymour Avenue
Lansing, Michigan 48933-1192
(517) 372-7780

## DIRECT EXAMINATION

BY MR. MCINTYRE:

Q You're married to Ron Wolfe, Sr., is that correct?

A Yes, it's correct.

Q And would you identify for the record where it is that you and Mr. Wolfe reside?

A Howell Township, 5753 Fisher Road.

Q All right. And were you residing at that address in December of 1996?

A Yes, we were.

Q All right. And do you recall the date that brings us here to Court, that being December 23rd, 1996?

A Vividly.

Q When some officers arrived at your home?

A Yes, I do.

Q All right. Do you have a recollection at the time the officers arrived what you and your husband were doing, if anything?

A We were both in the upstairs bedroom. He was on the telephone. We were both rising out of bed. I had been up for a little while. I looked out the window and I said, the police are here. And I proceeded to pull a pair of sweat pants on, because I had like a bathrobe on, and he grabbed some sweat pants also and pulled 'em on.

And we both walked down the stairs and he opened the front door.

Q And were there police officers there?

A There were more than police officers there.

Q All right. And do you know the approximate time their arrival occurred?

A 8:00 a.m.

Q About 8:00 a.m. All right. And they came into your home obviously.

A Yes.

Q And after their entry into the home -- into your home did anybody get arrested?

A Yes.

Q And who was that?

A Ron Wolfe.

Q Your husband.

A Yes.

* * *

BY MR. MARTIN:

Q It was in the afternoon?

A That they told me that I was being ready to be taken in. I was under the presumption that I was under arrest the moment they came in the door. No one had ever told me differently. I was, you know,

reprimanded to a chair and unable to move about freely.

Q And then there did come a time that you were advised by Det. Perry that you were doing some place.

A Right.

Q And that's when you wanted to all your daughter.

A Correct.

Q Okay. Were you allowed to call your daughter?

A Yes, I was.

Q All right. And what, if anything, did you tell her?

A I told her that I was being arrested and that could she come down and help me with bond?

And she said, where was I. And I say, well, if I'm not at the jail, I'll be at the home. I don't know when they're taking me. And she immediately came out and went to the jail.

Q Okay. Now, do you remember how long the officers were at your residence totally?

A Eight hours.

Q From roughly 8:00 in the morning 'til 4:00 --

A 4:00 p.m.

Q -- in the afternoon?

A Mmm hmm. Yes.

Q On the 23rd.

A Yes.

Q Why is it you're able to say eight hours with that preciseness.

A I had view of a clock at all times. I have huge grandfather clock that was positioned next to the chair I was in.

Q Okay. And at any time during those eight hours did you give permission to or consent to anyone to search anything?

A Absolutely not.

* * *

Q Do you remember throughout the eight hours did you always have a police officer with you?

A Always.

Q Were you ever told--did you hear Det. Perry's testimony that you were free to go wherever you wanted to go as long as you left the premises? In other words, you didn't have to stay there, that was the essence--

A No, I was never told--

Q --of his testimony?

A --I didn't have to stay there. And I was--I was offered amenities such as would you like to make yourself a copy of coffee, but there was always someone with me. Being that my home has an open floor plan, it's not that you can't see what

someone's doing in the kitchen from the living room.

Q But you did hear Det. Perry's testimony--or Perry's testimony did you not where he suggested, and again I'm kinda capsulizing, but as I understood it, he pretty much made it clear to you that, Marie, if you don't wanna be here while we're searching your home, you're free to leave.

A No, I was never told that.

Q Did they--did one or more of the officers come to you from time to time and seek information about things like the gun vault and that type of thing?

A Yes, they did.

Q They did.

A Mmm hmm.

Q And, so you were questioned.

A Yes, I was.

* * *

Q When did you learn that you weren't going to be going to the sheriff's department?

A It was about 4:00 and when my daughter found I wasn't at the jail, she came to the home, and I let her in. At first they wouldn't let her in and then I turned and let her in.

And we were sitting there waiting. I had given her a blank signed check to go and retrieve funds. And the reason I had to give her a check is because the money that I normally kept in the household was not there when I went to get it.

And, we were sitting there waiting. A two truck had arrived. And Swackhammer were all outside watching the golf cart being loaded. And my daughter and I were sitting there.

And it was about 4:00 and everybody packed up and left. And I was dumbfounded as well as my daughter about to what the status of my, you know, I was in.

Q Meaning that--

A You know, nobody took--

Q -when you saw them go you thought you were going to go--

A Exactly.

Q --also? And nobody even had the--

A Courtesy to tell me anything.

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**CASE NO. 97-50065-1**

**UNITED STATES OF AMERICA,**
***Plaintiff,***

**vs.**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

**Ordered By:** **KENNETH MCINTYRE, ESQ.**

---

# EVIDENTIARY HEARING

## VOLUME I

**BEFORE THE HONORABLE**
**PAUL V. GADOLA**

July 30, 1998, 9:17 a.m.

**APPEARANCES:**

For the Plaintiff: ROBERT HAVILAND, ESQ. (P25665)
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For the Defendant: KENNETH MCINTYRE, ESQ. (P17449)
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DONALD MARTIN, ESQ. (P17138)
313 S. Washington Square
Lansing, MI 48933-2193

Court Recorder: Julie Delling

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

THE COURT: Good morning to you. And I take it Mr. Wolfe is the gentleman seated wit you at the counsel table?

MR. MARTIN: Yes, sir.

THE COURT: All right, very well. All right. We have here the - - before the Court today for hearing, for an evidentiary hearing, the defendant's motion to suppress the proofs of a search conducted on December 23rd, 1996 of certain premises of Mr. Wolfe pursuant to a search warrant with the validity of that search warrant being challenged as well as the scope of the search itself.

Well you may proceed. I take it's the Government's burden to proceed here?

***

MR. HAVILAND: If I may, Your Honor, I'd like to begin with an opening statement which I think will -- hopefully will put some of the evidence in context.

To begin with I have discussed with Mr. McIntyre this morning the record of the hearing that was compile in the State Court motion to suppress on basically the same issues. And that this -- and I agree it's at least three reams deep.

I believe that by stipulation of the parties all of this maybe considered by the Court in connection with this hearing, is that correct?

MR. MCINTYRE: That is correct, Your Honor.

THE COURT: All right, very well.

MR. HAVILAND: It's my understanding that that Court will be providing the Court with a copy of that.

MR. MCINTYRE: Well, I had planned to provide the Court, and I will provide the whole thing. I have though an extra copy f or the Court's use today of Mr. Perry's testimony because I anticipate I'll be asking him certain questions based upon prior testimony. But I will run a copy and provide to the Court the entire transcript of all of the witnesses.

MR. HAVILAND: Thank you.

THE COURT: Well, if it's stipulated that the entire transcript is received, it will be considered by the Court in determining the issues here. And that needs to all be provided to me obviously, all of it.

MR. MCINTYRE: Yes, yes.

***

Now the next issue chronologically is one on which the Government bears the burden of proof, and I believe the only issue on which the Government beard the burden of proof. That is the issue of what happens once the Livingston County Sheriff's deputies got into -- inside the

hidden gun vault that was concealed in the basement of Mr. Wolfe's home.

Now at this point I am going to assume that the Court -- we have to assume or else there's no reason in going any further. Assuming that the officers were justified in being there and justified in opening the vault under the authority of the warrant, then the question is were they justified in seizing the guns that were found inside the vault.

There is no question that the warrant itself did not authorize the seizure of any guns. It authorized the seizure of A, building materials, golf carts, et cetera, et cetera. It did not authorize seizure of any firearms.

Therefore the Government has the burden of showing that the seizure of the guns inside the vault was justified by the plain view doctrine as that has been set forth by the Supreme Court.

***

MR. MCINTYRE: Oh, Okay. Essentially what the proofs are going to show is that Detective Perry when he entered the vault claims that he saw the marijuana right away and he immediately knew that it was a whole new ball game.

He immediately knew that he should be calling his prosecutor who helped and drafted the affidavit. He knew

that a legal issue was presented. He knew that he had before him the question of whether or not to go get another warrant.

He will testify that there was no fear that any of this material was going anywhere. That he could have gotten a warrant, but that he called his boss, as he calls him, he called Mr. Garber.

He will also testify, if consistent with what he said at the State Court level, that he's not a gun expert. That he has owned only one gun -- gun in his life. That he didn't know any of the requirements or ground rules for a federally licensed gun dealer insofar as the legal or illegal possession of any kind of weapon.

He didn't know what kind of paper work a federally licensed gun dealer had to have in order to abide by federal law. He's going to testify that he had previously told ATF Agent Evans that he was going to Mr. Wolfe's home and that he expected to find some guns there because he knew this man was a federally licensed gun dealer.

And he had generally concluded in his own mind that he was going to make a list of whatever guns he saw there and provide it to Agent Evans so that Agent Evans could do whatever was appropriate. He will testify, I believe again, if he's consistent with what he said at the State Court level, that he did not conclude and could not conclude that any of the weapons that he saw there in the vault were illegally possessed. He simply didn't know.

Had he knew because of the knowledge that Mr. Wolfe was a federally licensed firearm dealer, that there would be a substantial question as to whether or not any of these weapons were legal or illegal.

In short, focusing as we must on the sensory perceptions of the seizing officer at the time he allegedly made the plain view observation from a vantage point he had a right to be in, the testimony I believe will be uncontroverted that he did not immediately and apparently concluded that the weapons that he saw that he seized all of and later turned over to Mr. Evans, those which Mr. Evans asked for, were evidence of any crime.

And I suggest that given that factual bottom line that the effort of the Government to salvage this search under the plain view doctrine should go down. The suggestion that Mr. Perry even thought about a felony firearm basis for seizing these weapons is brand new. He never mentioned that at the State Court level. Nobody argued it in the State Court level.

***

## DIRECT EXAMINATION

BY MR. HAVILAND:

Q Would you state your name for the record, please?

A Allan Perry, P-e-r-r-y.

Q Mr. Perry, until March of this year did you work for Livingston County Sheriff's Department?

A Yes.

Q How long had you worked for the Livingston County Sheriff's Department?

A About 21 years.

Q What was your last job title with the Livingston County --

A I was a Detective for about ten years.

Q All right. So for the past ten years you were a Detective with the Livingston County Sheriff's Department?

A Yes.

Q About -- beginning about December 5th of 1996, did you begin an investigation of a man named Ronald Wolfe and his son Ronald Wolfe, Jr.?

THE COURT: What was that date again, Mr. Haviland?

MR. HAVILAND: Well, let me ask --

THE COURT: The date you inquired about.

MR. HAVILAND: Yeah. December 5th, 1996.

A Yes, it was early December.

Q Was that the first investigation that you personally had conducted of Mr. Wolfe and/or his son?

* * *

Q Now had you been involved in obtaining other search warrants in addition to this one that we're discussing right now?

A Yes.

Q How many search warrants had you requested in your career?

A Probably over 100.

Q Specifically with regard to -- I'm sorry, what Judge -- what Judges were available to sign such search warrants for you normally? Which Judge did you normally go to consider such warrant applications?

A That would be the Judge on call, if it were not business hours if you will, if Court was not in session, it would be the Judge on call.

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**CASE NO. 97-50065-1**

**UNITED STATES OF AMERICA,**
***Plaintiff,***

**vs.**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

**Ordered By:** **KENNETH MCINTYRE, ESQ.**

# EVIDENTIARY HEARING

## VOLUME II

**BEFORE THE HONORABLE**
**PAUL V. GADOLA**

July 31, 1998, 8:34 a.m.

**APPEARANCES:**

For the Plaintiff: ROBERT HAVILAND, ESQ. (P25665)
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For the Defendant: KENNETH MCINTYRE, ESQ. (P17449)
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DONALD MARTIN, ESQ. (P17138)
313 S. Washington Square
Lansing, MI 48933-2193

Court Recorder: Julie Delling

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

* * *

THE COURT: All right. So we've got a stipulation that the property -- the items to be searched for as listed in the search itself are the same items as are set forth in the affidavit.

MR. MCINTYRE: Yes, sir.

THE COURT: All right.

MR. MCINTYRE: Thank you, Mr. Haviland.

THE COURT: Very well, thank you.

Q Now, Mr. Perry, you have the affidavit, Joint Exhibit No. 1 in front of you?

A Yes.

Q Would you agree with me, sir, that in the language under property to be searched for and seized if found is specifically described as found that there are 11 different types of property to be searched for and seized?

MR. HAVILAND: Objection, the document speaks for itself. The witness' counting of what is in the document is of no benefit to the Court.

MR. MCINTYRE: Well --

THE COURT: Counsel, there's no dispute about that, is there?

MR. MCINTYRE: Let me then go through--

THE COURT: I thought we just stipulated to that now.

MR. MCINTYRE: Thank you.

Q The first type of property that the search warrant authorized you to search for was documents or evidence indicative of the ownership or occupancy of the above premises. Can we agree on that?

A Yes.

Q Okay. Now, Mr. Perry, in this affidavit starting at the bottom of the first page with the last word on the bottom of the first page you state, through investigations, and now I'm over to Page 2, public records, and affiant's personal knowledge, it has been determined that Ronald Napoleon Wolfe resides at the above place to be searched. Do you see that?

A Yes.

Q You were telling the Judge under oath that you had done an investigation and that you knew that Mr. Wolfe lived at the address of the property to be searched, is that correct?

A To the best of my knowledge, yes.

Q Okay. Did anybody, Mr. Perry, before this search warrant was applied for, did anybody tell you that any records or documents or evidence of ownership of occupancy of the premises that Mr. Wolfe's were on those premises?

MR. HAVILAND: Your Honor, I believe this was asked and answered yesterday repeatedly. I objected to that, that the question was argumentative and I believe that objection was sustained.

MR. MCINTYRE: I don't think it's argumentative for me to ask whether or not he had any advanced information.

MR. HAVILAND: Well that is not, but he's already answered that he did not. He's very clearly testified --

MR. MCINTYRE: There's a stipulation to that--

THE COURT: Yeah, I think he said that. He said that he was not advised by any of these informants whom he interviewed that these records were indeed within the residence of your client on December 23rd, 1996.

MR. MCINTYRE: All right.

THE COURT: And I think I posed the question to you as to whether or not --

MR. MCINTYRE. I know. I'm --

THE COURT: That really was a vitally important matter in light of the fact that very often when someone is suspected of some criminal activity the -- the affidavit for a search warrant of the allegedly culprit's residence lists as items to be searched for, records of the alleged illegal activity.

MR. MCINTYRE: Well of course here we're not talking about illegal activity, we're talking about residency records and documents.

THE COURT: Well, not entirely. There's records relating to horse ownership, veterinary treatment, horse sales, et cetera, et cetera.

MR. MCINTYRE: Well I'm just focusing on the first of the 11 at this point.

THE COURT: Okay.

Q And Mr. Perry, would you agree with me that there is no allegation in the affidavit that you had seen or you have been told by anyone that any residency records were at the Wolfe home?

MR. HAVILAND: Your Honor, I'm going to object to every question that begins, would you agree with me that the affidavit contains nothing, or what is in the affidavit. That's clearly just asking the witness to do no more than Mr. McIntyre himself or the Court can do.

This is not a subject for testimony, it is a subject for argument. And the question is argumentative. I object to it. The document is in evidence and it speaks for itself.

THE COURT: I've got the affidavit in front of me, Mr. McIntyre. It says what it ways and I got the search warrant in front of me and there has been a stipulation that the search warrant says that same thing that the affidavit says insofar as the items to be searched for and seized.

MR. MCINTYRE: Can we shorten this by a stipulation?

THE COURT: Let's shorten it if we can.

MR. MCINTYRE: Then, Mr. Haviland, can we stipulate that there is no allegation in the affidavit that any of the 11 types of properties listed in the property to be searched for and seized if found, is made in the affidavit that any of that type of property or those types of property was ever in the home, the residence of Ronald Wolfe.

MR. HAVILAND: I don't see the need to stipulate to that, Your Honor, but I think that what Mr. McIntyre has said is correct. If he argues that, I will not counter argue it. At least I don't believe so because I don't think so.

But I don't see the point in having this witness read through the thing to agree with Mr. McIntyre.

MR. MCINTYRE: Well, I didn't --

MR. HAVILAND: If Mr. McIntyre wants to argue that in his closing argument, he may do so. But this witness' reading of the affidavit is no more persuasive than Mr. McIntyre's, the Court's, or mine.

MR. MCINTYRE: Your Honor, I'm not going to ask him whether or not the affidavit contains any such assertions. But he did testify at Judge Burress' hearing that nobody, no person, no informant, nobody ever told him that any of these 11 types of property were ever present in

the Wolfe home prior to the time the search warrant was applied for.

MR. HAVILAND: And the testimony is in evidence in this hearing. The entire testimony is already in evidence. He doesn't need to ask it again unless he wants to impeach the witness on it.

MR. MCINTYRE: Well, if that's --

THE COURT: He said that. He said that, Mr. McIntyre. He said that in his prior testimony.

MR. MCINTYRE: Well he didn't say that with respect to all 11.

THE COURT: Pardon me?

MR. MCINTYRE: I don't believe yesterday I asked him whether or not all 11 of these different types of properties that they asked to search for were included in his answer that -- I think I asked him about some specific types of property. And, Your Honor, I'm simply trying to be careful and have a record before the Court that there was no information provided to the affiant ahead of time and therefore there could be no allegations within the affidavit unless they were untrue, that any of the 11 types of property that this search warrant authorized the officers to look for had ever been in the Wolfe home. And it's no mystery here I had attempted --

MR. HAVILAND: I thought he answered that yesterday, but if he wants to ask that one question again, go ahead, I have no objection.

THE COURT: The objection has been withdrawn, go ahead.

Q All right. Let me go at it this way then, Mr. Perry. It's true, is it not, that nobody told you that any of the types of property listed under the property to be search for and seized if found in the affidavit and in the search warrant had ever been in the residence, the home of Ronald and Marie Wolfe prior to the time this search was executed?

A As I stated yesterday I thought that Mr. Van Patten may have mentioned something about vet bills being in the home, but I can't be certain as to what he said. So I will answer that as no.

Q Well, no, nobody told you that? I don't want to be ambiguous here.

A I don't either, that's correct, no.

Q That's correct, nobody other than one exception told you that any of the property had been in the Wolfe home?

A That's correct. I don't recall anyone telling me that.

* * *

Q Okay. All right. On Page 3 of the affidavit in the second paragraph you again narratively describe in the early morning hour of September 15, 1996, theft of building material, do you see that, sir?

A Yes.

Q In this affidavit you say that -- or at least you signed onto language that said, and I'm reading now from about the fifth line from the bottom of that first paragraph, Van Patten indicated that Ronald Napoleon Wolfe, Ronald Nap Wolfe, Jr., and Richard Herbert Colbert substantively admitted that those materials had been stolen from the Bryon Road construction site. Do you see where I'm at?

A Yes.

Q That case went to trial, did it not, Mr. Perry?

A Yes, it did.

Q You testified in that case, did you not?

A Yes, I did.

Q Mr. Van Patten testified in that case, did he not?

A Yes, he did.

Q Mr. Van Patten testified in that case that Ronald Napoleon Wolfe, Sr. never admitted to having committed that theft, did he not?

MR. HAVILAND: Well, objection unless the witness was present and heard that testimony which I doubt in light of sequestration orders.

MR. MCINTYRE: He was there, Your Honor, he was the officer in charge. He's previously testified upon this issue at the Burress hearing.

THE COURT: Go ahead, go ahead.

Q You were there, weren't you, Mr. Perry?

A Yes, I was.

Q He so testified, did he not?

A Which one was this now, the OSB?

Q The OSB.

A That is correct.

Q All right. So what we have in this affidavit is an assertion attributed to Harold Van Patten that this man admitted stealing OSB boards and building materials. And the man to whom that statement is attributed to in the affidavit testified just the opposite, right?

A Well I think he was a little confused and I don't think he testified the opposite, he just said that -- I think he was confused as to who told him when down by the pole barn. What -- what I understood him to indicate was that Ronald, Sr. didn't tell him that the -- that he took the OSB board.

Q Okay. And that's dead opposite to what's in this affidavit, is it not, sir?

A Yes, it is.

Q In fact you made a write up of your interview with Mr. Van Patten about this building materials theft before this affidavit was prepared and signed, correct?

A Yes.

Q Mr. Van Patten in that interview did not tell you that Mr. Wolfe had admitted to stealing this OSB board, did he not?

A I don't recall. I don't have the report.

Q At the hearing in front of Judge Burress, all of those documents and all of this testimony was covered, was it not, sir?

A Yes.

Q And you told the truth at that time?

A Yes.

Q Thank you. With respect to the roofing materials description in the Joint Exhibit No. 1 down at the bottom it starts on the bottom of Page 3 and over on Page 4. The affidavit attributes to Mr. Van Patten a statement that -- I'm sorry the affidavit simply suggests that Mr. Wolfe made a delivery of roofing materials with the pole barn under construction on the premises to be searched. I'm reading from the top of Page 4. Do you see where I'm at, sir?

A Yes.

Q That statement is not attributed to anybody in the affidavit, is it, sir?

A This is the part that -- there was a delivery of OSB board to the premises. I don't recall whether Mr. Van Patten stated that Ronald Wolfe, Sr. had delivered it or not.

Q And the affidavit goes on to say the very next sentence, the roofing materials provided by Wolfe matched the itemized list of the roofing material stolen from the Fisher Road construction site and the shingle color and so on. Do you see where I'm reading?

A Yes.

Q Again there's no attribution as to who make that conclusion in this affidavit, correct?

MR. HAVILAND: Well, Judge, the warrant speaks for itself. I'll so stipulate that it doesn't say that.

THE COURT: Give me the particular language you're referring to here, Mr. McIntyre.

MR. MCINTYRE: Yes. It's the second sentence on Page 4 of Joint Exhibit No. 1. It starts out the roofing materials provided by Wolfe and it goes on to say it matched the list.

THE COURT: Yes.

MR. MCINTYRE: And my question was, that that conclusion that it matched the list is not attributed to anyone and I think I've got a stipulation.

MR. MCINTYRE: Judge, this is clearly simply argument. If all of this begins with affiant interviewed Harold Van Patten. What -- what difference does it make what this man intended? The warrant speaks for itself. If he wants to ask the man what Mr. Van Patten

in fact told him, that's perfectly proper. But asking him to characterize what the warrant says is not.

THE COURT: Well he's trying to establish, I believe, as I understand his line of questioning that -- that the affidavit is deficient in that it does not indicate any basis for the reliability of hoe information given by Van Patten and Harp. And ordinarily in a search warrant there's some statement in the affidavit to the effect that the particular confidential informant or whoever has been utilized in many many other matters and has always been found to be trustworthy and knowledgeable and all that sort of thing.

And I take it Mr. McIntyre, you're tying to establish that there was no attempt make to -- here to verify the reliability of hoe information given by Van Patten and Harp, is that -- is that basically it?

MR. MCINTYRE: Well, with regard to this specific sentence, Your Honor, with regard to this specific sentence at the top of Page 4 I'm simply attempting --

THE COURT: Well he says he verified -- he says he verified what was told to him -- let's see, the roofing materials provided by Wolfe matched the itemized list of roofing materials stolen from the Fisher Road construction site. And the shingle color of those materials matched the color of the shingles stolen from the fisher construction site. I take it that's the verification.

MR. MCINTYRE: Well, my point is that nobody in the affidavit is credited with telling the affiant that Mr. Wolfe make the delivery of roofing materials. And in addition to that the sentence that says the roofing materials provided by Wolfe matched the itemized list.

THE COURT: Well, obviously. All right.

MR. MCINTYRE: Again nobody has attributed as having made that conclusion.

MR. HAVILAND: And my objection, Your Honor, is just that. That this is simply argument about what is or is not implied by the warrant. He can argue that from now until the cows come home, but there's no point in arguing that with the witness.

MR. MCINTYRE: Let me go ahead, Your Honor.

THE COURT: I think that's right.

Q Mr. --

THE COURT: The affidavit speaks for itself, obviously.

Q Mr. Perry, the affidavit says as regards staying with these roofing materials that Mr. Van Patten told you that Mr. Wolfe and his son had admitted to the theft of these roofing materials? See that's about seven or eight lines down.

THE COURT: On Page 4?

MR. MCINTYRE: Page 4.

Q He said affiant -- Van Patten told affiant that he had noticed the roofing materials of Fisher Road had disappeared and subsequently Ronald Napoleon Wolfe, Ronald Nap Wolfe, Jr. admitted having stolen the roofing materials from the Fisher Road construction site.

THE COURT: That's an admission made to Van Patten.

MR. MCINTYRE: Yes, that's what the assertion is.

THE COURT: Okay.

Q You interviewed Mr. Van Patten about this roofing materials theft prior to the time this affidavit was prepared, did you not?

A Yes.

Q And you made a write up of that interview, right?

A Yes.

Q And in that write up you did not contribute to Mr. Van Patten any statement that Mr. Ronald Napoleon Wolfe had -- Sr., had admitted to the theft of these roofing materials, did you, sir?

A I'd have to -- I thought it was Ronald Wolfe, Jr. and Richard Colbert. He said took the materials and that Ron Wolfe had known about it or sent him out there or something like that. You're asking -- I don't have my report. You're asking me to guess, that's my guess.

Q No, that's fine. If you don't know, the answer is you don't know. The next question is this material was covered in detail in front of Judge Burress, was it not? This specific line of questioning about falsities in the affidavit.

A Well there was -- there was a line of questioning, a three day line of questioning about the affidavit, but I'm not sure specifically if that question was asked.

Q Exhibit No. 5, Mr. Perry, February 11. And I'm referring you to row -- to Page 12 starting at Line 17. Over to line -- I'm sorry, to Page 14, Line 7 is the reference I'd like you to take a look at. Have you had a chance to read that portion of the February 11th transcript, sir?

A Yes.

Q And were the questions put to you answered honestly by you in that excerpt, sir?

A Yes. Yes.

Q Okay specifically then Mr. Van Patten never told you that Ronald Wolfe, Sr. had admitted to stealing roofing materials, is that correct?

A That was my original answer.

MR. HAVILAND: Judge, I must raise another objection. As the witness just said he has testified identically today as he did in the earlier hearing. I'm objecting to Mr. McIntyre's continued effort to simply prolong these proceedings by bringing out that he said the

same things earlier. This is argument, Judge. This entire cross examinations nothing but argument

He is not impeaching hoe witness. He's getting the witness to say again what he said earlier.

THE COURT: On this hearing?

MR. HAVILAND: It's just guess.

THE COURT: In this --

MR. HAVILAND: He's saying the same thing now that he said earlier. And then he drags out the transcript and says, isn't that what you said earlier. And he says yes. Now this is not proper cross examination. Mr. McIntyre, almost his entire cross examination has been argument. He's simply trying to argue to the Court by bantering with the witness. We have got to get on with facts rather than argument.

MR. MCINTYRE: Your Honor, I didn't ask him yesterday anything about this.

MR. HAVILAND: Not yesterday, right now.

MR. MCINTYRE: Excuse me, could I proceed here?

MR. HAVILAND: I apologize.

MR. MCINTYRE: I'm trying to speed this up by not going back through in great detail everything that was gone through in great detail in front of Judge Burress by simply asking him to read what he said and adopt it as

his sworn testimony before Your Honor. I think I'm entitled to do that.

MR. HAVILAND: But, Judge, we don't need that. We have his sworn testimony in evidence already, 1,500 pages is before you. If Mr. McIntyre wants to use that in this hearing, all he has to do is read it to you in his argument.

I have admitted that stuff. I have no objection to that stuff. He doesn't need to read it to this witness and get him to repeat it all over again.

THE COURT: What is -- what's the -- what's the provision you're tying to get in from the transcript?

MR. MCINTYRE: Pardon me?

THE COURT: You've asked him to read something, what?

MR. MCINTYRE: To refresh his memory and therefore --

THE COURT: Well, what? Tell me what it is, where it is. I've got the whole transcript here, don't I?

MR. MCINTYRE: Yes, you do, your honor.

MR. HAVILAND: Volume 3, Page 12, I believe is where we --

THE COURT: Which day is --

MR. HAVILAND: Volume 3, Page 12.

MR. MCINTYRE: February 11th.

THE COURT: Which day's hearing?

MR. MCINTYRE: February 11th.

THE COURT: February 11th.

MR. MCINTYRE: Yes sir.

THE COURT: Line --

MR. MCINTYRE: It starts on Line 17 on Page 12, Your honor, and goes --

THE COURT: Line 17?

MR. MCINTYRE: Yes sir. And goes over to Line 10 on Page 14.

THE COURT: Well where -- I don't -- I've read it. I've read that information, Pages 12 and 13.

MR. HAVILAND: If I may, Your Honor.

THE COURT: Where does that impeach anything here? I guess I don't --

MR. HAVILAND: I will concede that point and perhaps that's --

THE COURT: What's the point? Tell me what the point is.

MR. HAVILAND: If I understand him correctly, his point is that the warrant affidavit says -- that attributes to Mr. Van Patten the statement that Ron Wolfe, Sr. and Ron Wolfe, Jr. admitted stealing roofing materials. On the -- on the examination before and today. I believe the witness states that in fact Mr. Van Patten had told him it was Ron Wolfe, Jr. and Ricky Colbert who had admitted climbing up and stealing the shingles. So the allegation in

the warrant that Mr. Ron Wolfe, Sr. was involved is an inaccuracy.

THE COURT: Are we talking about the shingles or the OSB board?

MR. HAVILAND: The shingles.

MR. MCINTYRE: Roofing shingles at this point, Your Honor.

THE COURT: What?

MR. MCINTYRE: The roofing shingles.

MR. HAVILAND: And that is a legitimate point that Mr. McIntyre can make, has made and can argue to the Court. My counter argument is rather obvious that this is not a complaint for Ron Wolfe, it is a search warrant for premises where Ron Wolfe, Jr. was living.

MR. MCINTYRE: If you read the affidavit, Your Honor, Perry asserted that Ron Wolfe, Jr. --

MR. HAVILAND: Well, that's argument. This is all argument, not testimony.

MR. MCINTYRE: You just made a statement that wasn't true. I think I'm entitled to respond to that. Ron Wolfe, Jr. wasn't living on these premises and it's --

MR. HAVILAND: All right. I stand corrected.

MR. MCINTYRE: Thank you.

THE COURT: Well, as I look at the -- at the transcript I don't find in the transcript unless I'm looking in the wrong place that this witness said that what's

in the affidavit regarding hoe admissions is wrong, or incorrect, or inaccurate. He just -- I think he says--

MR. MCINTYRE: Well, on Page 14 --

THE COURT: I'm looking at 13. Question, your testimony then is that Mr. Van Patten told you that Ron Wolfe, Sr. and Ron Wolfe, Jr. both told him that they had stolen these shingles and you didn't write it down, is that your testimony? Answer, to be honest with you I don't recall that statement, he may have made that statement. He may have made that statement to the prosecutor.

And then he says the prosecutor had talked to Harp and Van Patten both at the same time and there were a lot of statements made at that particular time. I didn't write those statements down. They did end up in the affidavit but I don't recall him making that statement. I can only assume that it did come from him, it's half right.

MR. MCINTYRE: I deem that to be a concession that he never heard Mr. Van Patten say that Ron Wolfe, Sr. had admitted to stealing the shingles.

MR. HAVILAND: And I agree.

MR. MCINTYRE: Thank you.

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Q Had you been trained that the affidavit had to be sworn to by the affiant in front of a Magistrate?

A Yes.

Q Or over the phone or however through faxes, right?

A Yes.

Q You were aware of all that on December 19th and 23rd of '96?

A Yes.

Q Had you been trained, Mr. Perry, to know that in seeking to search somebody's property, premises looking for specific property, that you had to allege that the property was there at the time you were seeking to obtain the search warrant? That's something your training suggested to you?

THE COURT: You had to allege what now?

Q You had to allege that the property that you were attempting to search for was there on the premises you're asking to search.

A I had to establish the probable cause to the Judge.

Q Right.

A Yes.

Q Probable cause to believe from what you wrote in the affidavit that the property you were searching for was on the premises you were looking to search, right?

A Yes.

Q And would you agree with me, Mr. Perry, that part of your training also suggested that what you knew in your own mind either as a result of your investigation or having been told by others, would

not assist you in getting a search warrant if you didn't put that knowledge down in the affidavit?

A What I knew in my own mind I should have put down in the affidavit?

Q I didn't make my question clear, let me go back. You learned, did you not, as part of your training, are you okay?

A Yeah, I'm fine.

Q Okay.

A I'm just trying to figure you out.

Q That's fair enough. You learned as part of your training that what you knew, what you've learned or seen with your own sense of -- if it was not put down in the affidavit was of no assistance to you in getting a valid search?

A No.

Q You didn't understand that to be the fact or the law?

A No. The information that I give to the prosecutor, the decisions are made by him as to what he wants to put into the search warrant unless I draft the affidavit myself and which I have done. And then sometimes it's even more lengthy, it just depends. But to -- to include the -- the war and peace when the Judge only wants three or four pages of the probable cause issues, tends to -- tends to be run on sometimes. So I think it's a judgment call as to how much information is enough to obtain the

probable cause for hoe search warrant. But that was the determination of Garber at this point.

Q Well, let me give you an example. Maybe I can make my question clearer. Let's say that you have been told by a witness or an informant that on my property I had some cocaine, obviously theoretical, okay?

And you wanted to get a search warrant for my property and you alleged a series of facts that you believe satisfied the probable cause requirement but you didn't put in those facts that you'd been told that I had cocaine, okay. The affidavit goes to the Judge and he give you authority to search for whatever you asked to search for, but not the cocaine. Is it your understanding and was it your understanding back in December of 1996 that because somebody had told you that I had cocaine on my property you could search for it even though the Judge hadn't been told about it and hadn't authorized you to look for it as part of that search?

MR. HAVILAND: Your Honor, I object. I appeal to the Court that although arguably that question somehow can be construed to be relevant to something, at this point I think it is very apparent that it is not material to this case.

We're beating a dead horse. Mr. McIntyre is simply arguing the law with the witness rather than with the Court

over the prosecutor. And we are simply wasting our time on this kind of a colloquy between counsel and witness.

MR. MCINTYRE: Your Honor, again the good faith issue has been raised by the Government and I think I'm entitled to explore his knowledge, his understanding as it relates to what he did on December 23rd.

THE COURT: He's indicated what he went there to search for, all right. And the items that he's indicated he went here to search for are the items listed in the affidavit and listed in the -- in the warrant issued based upon that affidavit or alleged affidavit.

He has said that he didn't go there to search for marijuana. He didn't go there to search for illegal firearms. But that in the course of the search for the items listed, he found the marijuana and the firearms, some of which he believed to be illegal firearms.

MR. MCINTYRE: Well he hasn't said that yet, Your Honor.

THE COURT: Well, I think so.

MR. MCINTYRE: Okay.

MR. HAVILAND: You Honor, I'm invoking Rule 403, I think it's Rule 403 at this point. The Court has the discretion to cut off inquiry when it is no longer of material value to the Court:

I think at this point it is clear that Mr. McIntyre's questions are not of any assistance to the Court in deciding

this issue. While they may arguably be relevant in some cosmic sense, they are not material.

THE COURT: I'll just tell you that it's my impression and my conclusion that when you've got a search warrant and you go to the premises to search, you're to search for the items that are listed and not for other contraband that you may think is there. You've got to go there to search for the items listed in the search warrant. But if you discover other contraband in the course of that search, then that's quite another matter.

MR. MCINTYRE: You Honor, I agree with your conclusion. I agree with that conclusion. And my question was designed to determine whether or not Mr. Perry agrees with that -- agrees with --

THE COURT: Well, let me ask.

MR. MCINTYRE: Thank you.

THE COURT: Are in agreement with that, Mr. Perry?

A Yes, I am, Your Honor.

THE COURT: All right.

MR. MCINTYRE: Thank you.

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Q Do you recall that you had to dismantle or dislodge some sort of locking device in order to get the doors

-- I'm sorry, the shelving doors open to get to the door to the gun vault?

A I believe so. I'm not exactly sure what they were though.

Q Do you recall -- it was a locking device of some sort?

A It was a hook or clap like this or something like that. I don't know if it had a lock of it or not.

MR. HAVILAND: If I may suggest, I believe he has the photographs and I believe one of them shows something that might help refresh his memory.

THE COURT: This is the lock on the what?

MR. HAVILAND: Gun vault, You Honor.

THE COURT: On the vault door?

MR. HAVILAND: Well, the bookshelf outside.

MR. MCINTYRE: I would suggest that the two doors of the bookshelves that swing open --

THE COURT: It's the lock to the bookshelves?

MR. MCINTYRE: Yes.

THE COURT: All right.

Q All right. In any event, Mr. Perry, something that had to be dislodged was dislodged to gain entry into the gun vault?

A Yes.

Q Okay. Now prior to December of -- December 23rd, 1996, it's true, is it not, that you had spoken with ATF Agent Evans about the impending search of Mr. Wolfe's home?

A Yes.

Q Do you recall when in relationship to the December 23rd search that conversation or those conversations would have occurred?

A No.

Q Would it have been shortly before the search itself?

A A day, are you talking about?

Q No, I'm talking a of a matter of a week or two week.

A Probably, yes.

Q The investigation, as I recall your testimony didn't begin until the 6th or so of December ,is that right?

A Yes.

Q So we can safely conclude that it would have been between the 6th of December and the 23rd of December that you told Agent Evans that you were planning to obtain a search warrant and search Mr Wolfe's home, is that correct?

A Yes.

Q Okay. Mr.Perry, do you recall why you would have told ATF Agent Evans that you were planning to obtain a search warrant and search Mr. wolfe's home?

A Well, we had the concern over what I had been told about the guns that were at the residence, I had some questions for him regarding what I thought was the law regarding registration of weapons. And he enlightened me as to what should be required for weapons.

Q Okay. Let me go into that for just moment. You said that we had concern. Who is we, sir?

A Those handling the cases, those officers, myself, Swackhammer.

Q Swackhammer.

A Deering.

Q Well you had been told, had you not, I think we've established you'd been told of reports of automatic gun fire emanating from the Wolfe premises over the years. All right. And you went to Mr. Evans to tell him of the upcoming search of the Wolfe residence to gain information about Mr. Wolfe's status as a licensed firearm dealer, is that fair?

A I asked him what kind of license he had.

Q You knew at that time, did you not, Mr. Perry, that there were differing classed of federally licensed firearm dealers?

A Yes.

Q And it's true, is it not, that you didn't know at that point which level of federally firearm licensed dealer Mr. Wolfe was?

A Correct.

Q And it's also true that you asked Mr. Evans that very question, what level of federally licensed firearm dealer is Ron Wolfe?

A Yes, I believe I did.

Q You also asked him whether or not there was any ATF investigation of Mr. Wolfe pending at that time, did you not?

A I don't recall, I may have.

Q Okay. And hoe fact is that at that point Mr. Evans told you that he couldn't tell yo whether or not or what level of registration that Mr. Wolfe had with respect to being a federally licensed firearm dealer, that's correct, is it not?

A Yes.

Q It's true, is it not, Mr. Perry, that sometime well before December -- well, no, strike that.

In December of 1996, Mr. Harp told you during one of your conversations with him that he, Mr. Harp, though Mr. Wolfe had some illegal guns in his gun vault?

A He may have, yes. I don't recall what -- exactly what he told me. But he may have told me that.

Q If you would, sir, to refresh your memory on that point, turn to the February 9 transcript and on Page 104. And I'm looking at Lines 14 through 16 specifically sir.

A Okay.

Q Does that refresh your memory as to the fact that Mr. Harp had told you sometime in December of 1996 that he thought Mr. Wolfe had some illegal guns in his gun vault?

A Yes.

Q All right. And there was no follow up by you of that report, was there, Mr. Perry?

A Follow up?

Q You didn't go to Agent Evans, you didn't go to your boss and say hey, look I've got an informant here telling me that Mr. Wolfe has some illegal guns in his basement?

A Well, I probably told Detective Lieutenant Deering that.

Q Okay.

A I don't know if I conveyed that to Agent Evans or not.

Q Do you recall whether there was any investigation undertaken to that end? That is to determine whether or not there were illegal guns in Mr. Wolfe's basement.

A I did not conduct any investigation.

Q And you know of none, do you, sir?

A I don't know of any, no.

Q Actual, sir, when Mr. Harp made that statement to you, you didn't know whether or not any guns in

Mr. Wolfe's basement, if there were even there, were legal or illegal, did you, sir?

A No.

Q And you didn't know when you entered the Wolfe home on December 23rd whether there were any guns in the gun vault in the basement, did you, sir?

A No.

Q You did, did you not, Detective Perry -- or Mr. Perry, believe based on what you heard prior to that entry that there would be some guns in the gun vault?

A I had cause to believe that there would be guns at the residence, yes.

Q Yes. You didn't know what type or what number at that point, is that fair?

A Well, there were -- both Harp and Van Patten talked about, you know, a lot of guns in the gun vault, a couple hundred guns in the gun vault and some were machine guns and some were pistols and things like that. But they --

Q Both Harp and Van Patten told you that?

A Yeah. They didn't give me a specific number though as to what they would -- you know, how many there would be or exactly what types they are, no.

Q Isn't it true, Mr. Perry, that Mr. Harp's descriptions of guns on the Wolfe premises was limited to guns

seen in the apartment over the horse stall in that barn, isn't that a fact, sir?

A Mr. Harp's?

Q Mr. Harp's description to you of guns that he'd seen on the Wolfe premises was limited to guns that he had seen in the apartment over the horse stall when Mr. and Mrs. Wolfe lived in that apartment, isn't that true?

A I don't think so, no. He talked about the vault.

Q Your testimony today is that Mr. Harp told you that he had seen hundreds of guns in the vault?

A That's what he told me.

Q Okay. All right. Mr. Perry, Mr. Evans back in 1996 lived in Howell - I'm sorry, in Livingston County, did he not, Agent Evens?

A I believe so, yes.

Q And Mr. Evans was a person that had told you on several occasions before December of 1996 that if you had any questions about guns that were seized or guns that became somehow at issue, that you could feel free to come to him to ask him those questions, is that fair?

A That's fair?

Q And it's true, is it not, Mr. Perry, that when you told Agent Evans in December of 1996 of the impending potential search of Mr. Wolfe's home, he again told you that if you had any questions about

guns that might be seen or seized that you could feel free to ask him those questions?

A Probably.

Q Mr. Perry, it's also true that in December of 1996 when you spoke with Agent Evans before the search was conducted, you asked him whether or not Mr. Wolfe or really anybody could possess automatic weapons and silencers lawfully, did you not?

A In December I may have, I don't know. I had known that for quite some time.

Q Pardon me?

A I've known the answer to that question -- I already knew the answer to that question. That there were certain gun dealers that could possess automatic weapons.

Q Would you take a look then, sir, at Page 105, February 9 and I'm directing your attention to Lines 15 down to Line 23.

A Yes.

Q Does that refresh your recollection in terms --

MR. HAVILAND: He hasn't testified that his memory needed to be refreshed, Your Honor. He's testified that he knew it all along.

Now the question that Mr. McIntyre asked on Page 105 is different from the question that he's trying -- now trying to impeach the witness with.

Q Did you -- let me rephrase the question, Mr. Perry. Did you ask Mr. Evans in December of 1996 before the search of Mr. Wolfe's home if Mr. Wolfe was allowed to possess silencers and automatic weapons?

A Yes.

Q And the reason you asked him that question is you had been told by either Mr. Harp or Mr. Van Patten that there were such weapons in the basement of the Wolfe home, is that correct?

A That coupled with the fact that it was -- if there were automatic weapons on the premises I would have to brief that entry team of that.

Q All right. And the reason you asked Mr. Evans whether or not Mr. Wolfe could possess automatic weapons and silencers is you wanted to know the answer to the question, is that fair?

A Yes.

Q You didn't know the answer, that's why you asked?

A Yes.

Q In fact Mr. Perry on December 23rd when you entered that gun vault, you didn't know what kinds of weapons various federally licensed firearm dealers could lawfully possess, did you, sir?

A The breakdown of who could possess what, no.

Q And you didn't know when you entered that gun vault on December 23rd what sort of records a licensee was supposed to have with the guns that he

or she were storing in a given position or place, did you, sir?

A I knew that they were supposed to have a log book, actually two.

Q With the guns or did you know where it had to be possessed?

A It was supposed to be with the guns, that was my understanding. One, the registered and one the unregistered or the weapons that were for sale that don't require registration.

Q All right. And you subsequently after December 23rd learned that your understanding in that regard was in error, didn't you?

A Well the error would be that they were supposed to be with the business, the records. I believe if that's true and I'm still not certain of that.

Q Pardon me?

A I'm not certain of that, but I think that's correct.

Q Do you now know what class of federal firearm licensee Mr. Wolfe was on December 23rd?

MR. HAVILAND: Objection, irrelevant.

MR. MCINTYRE: I'm going to the plain view.

THE COURT: Go ahead, go ahead.

A I believe it's Class III.

Q And do you now know what weapons a Class III federally licensed person can lawfully possess?

MR. HAVILAND: Objection, irrelevant. You Honor, he's asking these questions now. How can this possibly reflect on what he did or thought on December 23rd, 1996?

MR. MCINTYRE: I'm going to ask that question as a follow up.

THE COURT: Well why don't you ask that question.

MR. MCINTYRE: Pardon me?

THE COURT: Why don't you ask that question.

Q Okay. Did you on December 23rd, Mr. Perry, know what record a Class III firearms dealer had to maintain in order to lawfully possess firearms?

A I only knew that a Class III dealer would have to have the log books for the firearms. And that the firearms would have to be registered. Other than that, no, I was not --

Q And I think we've established on December 23rd you didn't even know he was a Class III dealer, fair?

A No, I didn't.

Q Mr. Perry, would you agree with me, sir, that police jurisdictions purchase a variety of firearms from federally licensed firearms dealers? Is that something within your knowledge?

A Police jurisdictions?

Q Yes, sir.

A They purchase weapons from firearms dealers, yes, I believe so.

Q And was it within your knowledge on December 23rd that federally licensed firearm dealers can possess certain weapons that persons who are not so licensed cannot possess? Was that something within your knowledge on December --

A Yes.

Q And Mr. Perry, the fact of that matter is that when you got into that gun vault and you saw the guns there in the vault, you couldn't tell from looking at those guns whether or not they were legally or illegally possessed by Mr. Wolfe, could you, sir?

A Well it's pretty broad question there, Mr. McIntyre. But I would say that there were certain weapons in there that I had question about the legality of. Now if you're talking about ownership, no, they didn't have his name stamped on them.

Q Mr. Perry, do you recall this question being --

THE COURT: Well you said you had questions about some of the weapons. What questions?

A Well the -- some of the weapons that I saw, for instance the pen guns. I questioned whether they were legal to be possessed by anyone. I really wasn't sure at that point. I knew that they had to have serial numbers.

Q Well, excuse me. When you first went in the door and saw these guns are you saying you saw the pen guns, or did you find them during the inventory of the weapons?

A The pen guns were sitting right there. The pen guns were there along with several other different types of large and small weapons and handguns and stuff.

THE COURT: Were they any other items that you had questions about when you -- about their legality when you entered the gun vault? You mentioned the pen guns.

A Well, as far as -- I guess, You Honor, I'd have to go through the list and see which ones I questioned right off the bat and which -- which ones I didn't, so -- the automatic weapons that I thought may be automatic weapons because they looked like automatic weapons, and forgive me, but I'm not an expert on weapons, so --

THE COURT: All right. So you saw what you thought to be automatic weapons and you had questions as to whether those would be legal, right?

A Yes.

THE COURT: All right.

MR. MCINTYRE: May I proceed, Your Honor?

THE COURT: Did you observe the silencers when you entered there?

A Yes.

THE COURT: Did that raise any question in your mind?

A Well it did. I didn't know whether they were -- I didn't know whether he could legally possess silencers or not, or whether they were supposed to be attached to sawed off rifles or -- I guess I'd have to say that I --

THE COURT: Were there some sawed off -- there were some sawed off firearms in the --

A Sawed off rifle. I had a lot of questions.

THE COURT: All right. Did you have a question about the legality of the possession of the sawed off weapons, sawed off firearms?

A Correct.

THE COURT: Go ahead, Mr. McIntyre.

Q Mr. Perry, I want to direct your attention to Page 49 of your February 10, 1998 testimony, sir. Line 21 through 25.

A Okay.

Q Do you recall this question being put to you, so you couldn't, for example, looking at the wall and seeing a machine gun or any king of gun you couldn't know at that point whether or not his license allowed him to have such a gun, could you? And your answer was no.

A That's correct.

Q That's still true, is it not?

A Yes.

MR. HAVILAND: I'm sorry, what page was that, sir?

MR. MCINTYRE: 49 of February 10th.

MR. HAVILAND: Thank you. Thank you.

Q You've just indicated, sure, I think that you is response to the Judge's question, you're not a gun expert?

A No.

Q You told me that several times back in February, do you remember that, sir?

A No.

Q You don't remember, okay. Do you recall, sir, that you had to call in Agent Evans after December 23rd to make a determination about the legality of all of the weapons seized from the gun vault because you were not gun expert, do you recall that testimony?

A Yes.

Q That's true, is it not?

A Yes.

Q And it's also true, Mr. Perry, that before December 23rd and when you knew you were going to search Mr. Wolfe's home, that you intended to look for and look at weapons during the course of that search. That's true, is it not, sir?

A Well normally we would look at every weapon in every house of every search.

Q Now bear with me. The search warrant in this case gave no authority to look for or seize any firearms, correct?

A That's correct.

Q And your testimony is that you intended pursuant to this usual practice, to look at every weapon in the house when you went into the house? Did I understand that correctly?

A Well, it's pretty hard not to see the weapons. My intention was to look for the items that were on the affidavit, including the documentation that the weapons are there, the weapons are there, there's nothing I can do about that.

Q Didn't you intend, sire, before December 23rd to look at the weapons that you saw, to report what you'd seen within respect to those weapons to Mr. Evans that you assumed he would take whatever necessary action there was to take, isn't that a fact?

A Is your question to seize the weapons, or just look at the weapons?

Q No, just look at them. Make a list of whatever you're going to do and report them to Mr. Evans, your assumption being he'd do whatever had to be done with these weapons.

A If I felt during the course of the search warrant that illegal weapons were discovered, then I would document that and report back to him, yes.

Q Page 106 of the February 9 testimony, Mr. Perry --

MR. HAVILAND: Your Honor, I know we're trying to get this moving, but I would object to Mr. McIntyre continually trying to impeach the witness who has not testified contrarily and who has not said that his memory needs to be refreshed. Why do we keep going back to the transcript? If he's not trying to impeach the witness and not trying to refresh his memory, why do we do this?

THE COURT: I don't know if he is here or not.

MR. MCINTYRE: I am trying to impeach him, Your Honor.

THE COURT: Well, show us where the inconsistency is.

MR. MCINTYRE: And I have to -- I think I have to offer him the chance --

THE COURT: Go ahead, go ahead, go ahead.

Q I'm directing your attention to Line 13 down to Line 23 on Page 106, Mr. Perry.

A Well that was my previous answer. I would have just simply --

MR. HAVILAND: Well, there's no question. He has asked you to read it. I assume the witness has now done so. Let's wait for a question.

MR. MCINTYRE: Thank you.

Q Mr. Perry, have you had a chance to read that?

A Yes.

Q Does that refresh your memory insofar as whether or not you intended to simple note what records were there, report what you'd found and Agent Evans he could take whatever action needed to be taken, is that right?

A Well, now that is -- no, that's not right. I didn't go to the Wolfe residence to seize weapons. I had no intention of seizing any weapons at the Wolfe residence.

MR. HAVILAND: Again, I object to the witness' answer as non-responsive. The question was, did this -- does this refresh your memory. The answer was no. Now --

THE COURT: Well, nevertheless, I'll take the answer.

A My answer --

THE COURT: I think you've answered it. You've given an answer. Mr. Haviland doesn't think it was responsive to the question, but I've taken the answer. Move on.

Q Well, Mr. Perry, I think you've indicated you didn't intend to seize any weapons when you entered that house, right?

A Right.

Q You did seize some weapons after you had entered the house, right?

A Yes.

Q And the reason --

MR. HAVILAND: Your Honor, going back to my earlier objection, I apologize but Mr. McIntyre has not impeached the witness. There is nothing in here that impeaches his testimony.

Unless the Court sets some rules for Mr. McIntyre, we're going to be reading this entire thing and arguing with the witness for another three hours.

MR. MCINTYRE: We are not, Your Honor --

THE COURT: Well move along then, Mr. McIntyre.

Q Mr. Perry, what changed your original intention to not seize any weapons during this search was the discovery of the marijuana, was it not, sir?

A Well, the -- what I had seen of the weapons, of the pen guns, what I thought were machine guns, the weapons being next to the marijuana, or in with the marijuana, so I guess -- and a consultation with the prosecutor, I guess all those things coupled or

together, I made up my mind to seize the weapons for inspection.

THE COURT: You called the prosecuting attorney from the --

A Yes, sir.

THE COURT: From the defendant's residence after you had entered the gun vault and found the growing marijuana plants and the collection of weapons?

A Yes, I did.

Q Yesterday, Mr. Perry, you indicated that your first indication that there was any marijuana in the safe was when you walked in and saw it, did I understand that correctly?

A Yes.

Q You testified several times in from of Judge Burress that you smelled marijuana before you actually got into the vault, is that true?

A You could smell an odor. Now specifically if I knew whether it was coming from the gun vault or not, I'm not real sure. And I would have to probably look at the transcript again to find out what -- what it was that I specifically said because I don't recall it.

Q Well, we'll look at it. Okay. By the time you entered the gun vault Mr. Ron Wolfe was gone from the premises, was he not?

A Yes.

Q And there was someone sitting with -- an officer sitting with Mrs. Wolfe upstairs?

A Yes.

A And that officer's instructions were to monitor her and not permit her to roam around within the home while the search was being conducted, is that fair?

MR. HAVILAND: Judge, how could he know and what difference does it make? Objection, lack of foundation and irrelevant.

MR. MCINTYRE: Your Honor, if I may be permitted to continue this line of questioning, I think I can be done in about a half an hour.

MR. HAVILAND: I'll be quiet.

MR. MCINTYRE: If I have to explain my motivation for asking every question we will be here a while.

THE COURT: Well, that's been sort of my thought that really I've given you a lot of latitude because I think we could be here interminably if we halted to have a long colloquy and a debate on each of these points. Go ahead.

Q Do you remember my question, Mr. Perry?

A Yes. She was --

Q Go ahead.

A I'm sorry. She was sitting in the living room with one or two or three officers at times.

Q That was a standard practice, was it not, Mr. Perry, during a search that you monitor or seek to control the occupants so they don't get in the way?

A Yes.

Q And so they don't pose a security problem?

A Yes.

Q And so that they can't secrete or hide evidence, that's also the reason?

A Yes.

Q All right. So when the discovery of the marijuana and the contents of the gun vault occurred, there was no security threat posed by either that marijuana or those guns at the time you first saw them, was it?

A No.

Q In fact when you saw the marijuana, do you remember the words that you uttered? Didn't you testify in front of Judge Burress that the first words out of your mouth when you saw the marijuana were plain view, didn't you way that?

A I may have.

Q And is that true? Is that your recollection of what you first said when you saw the marijuana?

A I may have.

Q And is that true? Is that your recollection of what you first said when you saw the marijuana?

A I would have to review the transcript.

Q You don't recall today?

A I don't recall the statement.

Q Well am I now being asked to find that portion that I had not intended --

THE COURT: Was is there any question really once you entered the vault the marijuana plants, growing plants were in plain view, weren't they?

MR. MCINTYRE: Right. There is a question about that but there's certainly no question that he so testified.

Q Mr. Perry, you could have posted a guard there at the door of the vault and gone and gotten a specific search warrant for anything that was in the vault, could you not?

A Yes.

Q And you considered doing that, did you not?

A Yes.

Q That was one of the reasons you called Mr. Garber to find out whether or not that was necessary?

A That would be the Chief Assistant Prosecutor Mr. Garber, yes.

Q Yes, sir. All right. And one of the other reasons you did that, and you knew that this search warrant didn't make any mention or have any authorization for the seizing of either marijuana or guns, right?

A Correct.

Q And it's true, is it not, Mr. Perry, that when you saw the marijuana and you saw the guns, you

immediately concluded that wait a minute, we got a legal question here, isn't that correct?

A Well, if I'm called the prosecutor it's obviously a legal question.

Q Pardon me? My question was you immediately concluded that when you saw these objects?

A I don't know what I immediately concluded. I called the prosecutor to get some advice as to how to proceed.

Q Okay. If you would then, sire, turn to the February 10, Page 122. And then I'm asking you to look at Lines 12 through 20, sir.

A Okay.

Q Do you agree having reviewed that that the sighting of the guns and marijuana posed a legal question in your mind immediately?

A Well I said it was a legal question. I don't know if it was -- and I said I didn't know whether it was immediately. There was a whole slew of things going on there at the same time, but --

Q You did say that's why I called Garber in the first place, did you not?

A Yes.

Q And you did say and it is true that it wasn't for you to decide whether or not these weapons were connected to the dope, that's what you said back in February of 1998, is it not?

A Not without counsel.

Q All right. And you did not associate any firearm that was seized from the Wolfe premises on December 23rd with the marijuana, did you?

A Well I associated them, I just don't -- see normally we don't act upon things like that because if they're not in the search warrant, we always call the prosecutor. And that's just the standard thing to do. I mean obviously you have guns, you have dope, something's wrong. So we call and get direction and see how to proceed from there.

Q Well here's the questions to work with, sire. Let me try it again. Did you associate any -- any firearm that was seized from the house directly to be related to the marijuana growth operation? Answer --

MR. HAVILAND: Judge, again he's just reading from the prior record. He's not refreshing the witness' memory, he is not impeaching the witness. He doesn't need to get this into evidence, it's already in evidence. I object to this type of cross examination.

MR. MCINTYRE: I'm trying to impeach the witness and I'm trying to be fair with him by reading the questions and answers because they are inconsistent with what he just said.

MR. HAVILAND: I want a chance while I have the man to cross examine him about the inconsistencies.

THE COURT: Go ahead.

Q Let me start again. Did you associate any firearm that was seized from the house directly to be related to the marijuana growth operation? Answer, well, I felt in my mind that was a legal question that's why I call Garber in the first place. I wasn't for me to determine whether or not those guns were connected to the dope. That may require an entirely different and lengthy investigation.

Question, right? Answer, so. Question, so the answer to my question is you didn't one way or the other? Answer, no. Any weapon with the marijuana growing and the materials, not any particular weapon, no. There weren't any weapons with the marijuana if that's what --

Have I accurately read that, Mr. Perry?

A Yes.

Q Was that your testimony --

THE COURT: Well where does that impeach him?

MR. MCINTYRE: He's talking about associating or having a question about guns with marijuana, Your Honor. And this testimony I --

THE COURT: He said then that he called the prosecuting attorney for advice on that matter. He says here today that he called the prosecuting attorney --

MR. MCINTYRE: Yes, sir, he did.

THE COURT: -- for advice on this matter because he frankly didn't know what the situation -- legal situation was when he entered the gun vault and found these growing marijuana plants and the grow light system and the hydroponic watering system and all that sort of business that was within that vault. And also these firearms.

MR. MCINTYRE: Your Honor, the prosecutor has cited cases in his brief to suggest that when officers, and I think the facts in those cases were when officers go to execute a warrant for drugs and they find guns, that it's reasonable for them to draw an association and seize the guns. I am attempting to draw a association and seize the guns. I am attempting to point out that that was not the case here and that the officer contended to have --

THE COURT: You called the prosecuting attorney, right?

A Yes, I did.

THE COURT: Did he give you some advice?

A Yes.

THE COURT: What did he tell you?

A He said based upon what I told him to seize every weapon in the house.

THE COURT: To seize all the weapons?

A Yes.

THE COURT: So you did so?

A Yes.

THE COURT: All right.

Q And Mr. Perry, to wrap this up --

THE COURT: So now is there -- I still don't see where the -- where the impeachment is involved here.

Q Mr. Perry, to wrap this all up, that was the only reason you seized those guns, wasn't it? Mr. Garber, your boss' direction, or suggestion, or recommendation, isn't that true?

A Well, I can't tell you. If the decision was left to me to make alone, I was being obviously advised by other detectives there and so forth, there was a conversation, resulted in my call to the prosecutor.

So can I tell you whether I would have seized those or not based upon my independent information I had at the time, I don't know, I probably would have.

THE COURT: You probably what?

A I probably would have.

Q Page 88 of February 9, Mr. Perry.

MR. HAVILAND: Same objection, Your Honor. I assume I'm -- I'd just like continuing objection to this procedure of --

THE COURT: All right. What page are we going to now?

MR. MCINTYRE: Actually the bottom of Page 87 starting on Line 24 down to Line 7 of Page 88, sir.

THE COURT: Well, I hope that you are going to find something here that is inconsistent with some testimony here, because I surely didn't find it with regard to the matter of the firearms and the marijuana. The witness just reiterated here what he said in the transcript of the hearing before the Circuit Judge.

Q Have you had a chance to look at that, Mr. Perry?

A Yes.

Q Were you asked on February 9th whether the only reason in your mind that allowed you to seize the guns from the gun vault was speaking to Prosecutor Garber?

MR. HAVILAND: May I have a line reference?

MR. MCINTYRE: Yeah, Line 2 through Line 7 on Page 88.

MR. HAVILAND: Well, I'm on the wrong day, I'm sorry. What day is this?

MR. MCINTYRE: February the 9th.

MR. HAVILAND: Thank you.

THE COURT: The 9th?

MR. MCINTYRE: Yes, sir.

THE COURT: Okay.

Q Are you there, Mr. Perry, on the same page I am?

A Yes.

Q Isn't it true, sir, having looked at that, that the only reason you seized the guns from the gun vault was Prosecutor Garber's directive or advice to do so?

A Well that's not exactly accurate. It says the only reason in your mind that allowed you to seize these guns in the gun vault was the directive from the prosecutor, yes.

Q That's true?

A Yes. If the prosecutor says seize the guns, you seize the guns.

THE COURT: That's what you're saying now? And I take it that's what you said before isn't it?

MR. MCINTYRE: That isn't the way I understood it, Your Honor, but if we're agreed that's the fact, that's fine with me.

MR. HAVILAND: Judge, we were agreed that was the fact before the witness took the stand. All this stuff was in evidence before the witness took the stand. We don't need to have these continuous arguments with the witness about what's already in evidence. There is no dispute about this record, it exists. He doesn't have to ask him about it.

MR. MCINTYRE: And I respectfully request permission to continue my cross examination.

* * *

Q Mr. Perry, I'm holding up a heavy metal object in my right hand. Can you identify what that is?

A Some type of weapon.

Q And can you tell from looking at it what kind of weapon it is?

A No.

THE COURT: Well, can you tell it's a firearm?

A Yes, I can.

THE COURT: All right. It's not a knife, it's not a club, it's a firearm, okay.

MR. MCINTYRE: Okay. I agree with that.

Q Can you tell from looking at it whether or not a Class III federally licensed firearm dealer can lawfully possess it or not?

A I don't know.

Q I'm holding up in my hand a pen looking object. Can you identify what that is?

A It's a pen looking object. I could be a pen gun.

Q All right.

A I'll have to see it.

Q All right. Can you tell from just looking at it, sire, without turning it over in your hand and examining it whether or not it has a serial number on it?

MR. HAVILAND: Without turning it over?

MR. MCINTYRE: Yes.

MR. HAVILAND: I'll stipulate that you can't tell whether it has a serial number without turning it over.

MR. MCINTYRE: Thank you.

THE COURT: Okay.

Q Based on your observation of pen guns that you say you saw in the vault when you first went in there, you couldn't tell whether or not they had serial numbers or not, could you, sir?

MR. HAVILAND: I just stipulated to that.

MR. MCINTYRE: I'm laying a foundation for another question, if I may, Your Honor.

THE COURT: Go ahead, go ahead.

A Without securing them and moving them, the serial number probably could be on the other side, that's correct.

Q That's true of all guns. You couldn't tell whether they were -- had serial numbers or not without handling them, securing them and in some fashion examining them, is that fair?

A Well some of them you could see the serial numbers on.

Q Oh, okay. So the ones you could see then you didn't have to do that right?

A The ones I couldn't see, what?

Q The ones you could see serial numbers on in just looking at them you didn't have to examine them to see that they had none because you could obviously see they had some?

A That's correct.

Q You testified yesterday that there was an automatic weapon near the door as you entered the vault, remember that?

A Yes.

Q You testified yesterday that it was loaded?

A I believe it was.

Q And could you tell that it was loaded as you walked through the door, or again did you have to examine it in some fashion to determine whether it was loaded?

A I believe the magazine was in it, but without examination I probably couldn't tell whether rounds were chambered, no.

Q Okay. You couldn't even tell whether rounds were in it, could you sir, just by looking at it?

A Probably not.

Q Could you tell from just your initial observation of any of the guns there in the gun vault whether they were loaded or not?

A Some you could, some you couldn't.

Q Which kind could you tell were loaded just by looking at them?

A Well, revolvers you can tell when they're loaded. Revolvers.

Q A six shooter type thing?

A That's correct.

Q Okay. And did you observe any loaded revolvers when you walked through the door?

A Yes.

Q Did you conclude that there was anything suspicious about those revolvers?

A No, I don't believe so.

***

Q Mr. Perry, the search of the Wolfe residence on December 23rd yielded approximately 2,000 pages of documents, did it not?

A After I made copies of all the checkbook receipts, yes.

Q And it's true, is it not, that virtually all, if not all of those documents were seized from the Wolfe home as opposed to the barns, or the cars, or whatever else was searched?

A There were some, I believe, from the cars and some from the home, yes.

Q Okay. And it was your practice on that day, was is not with respect to documents, that you would seize whatever document may have had in your opinion some relevance and read those documents later, is that fair?

A Could you repeat that, please?

Q Yes, It was your practice that day with respect to documents, to seize all documents that may have had any relevance to you and read them later to determine whether or not they were evidence of any criminal act or anything that was of use to you, is that fair?

A Well, the documents that we seized, most of the documents I knew because there was so many that I would have to go through them all to find if there were any receipts verifying the purchase of those items by Mr. Wolfe. And does that answer your question?

Q Didn't -- let me ask another question. Didn't you testify in front of Judge Burress in the OSB case that this search incorporated your practice of seizing numerous documents without reading them and reading them later to determine whether or not they had any relevant material?

A I don't recall.

Q Was that your practice back in December of 1993, sir, with respect to documents? I mean, '96, I'm sorry.

A Well in a case such as this it probably would be because we have so many different types of violations and so many different types of documents that we -- we have to sift through and find.

Q Page 49, sir, on February 9th. And I'm directing your attention to Page 49 starting at Line 6 down to Line 12.

A Yes.

Q Now having read that, isn't it true that on the 23rd of December 1996 at the Wolfe residence you seized substantial quantities of documents without reading them and read them later to determine whether they had anything or use?

A Yes.

Q Thank you. And wasn't it also a practice that you engaged in on the 23rd of December 1996 in this search to take things that you thought might be used by Mr. Wolfe to defend future criminal activities or charges of criminal activities, isn't that true?

A Say that one again, please.

Q Yeah, let me try it again. Isn't it true that on December 23rd you seized objects because you thought those objects might be used by Mr. Wolfe to defend future as yet uncharged criminal acts?

A No, I would never take items out of the house to remove them so he could not defend himself at a later date. That's --there were like I said before, several officers there searching. I guess I don't understand what you're asking.

MR. HAVILAND: Yeah, may we have some suggestion of the basis for this questioning which is entirely new to me. And I think it's entirely new to the record.

THE COURT: Mr. McIntyre. Are you going to pursue this any further?

MR. MCINTYRE: Yes. I'm looking for the reference in the transcript, Your Honor.

Q Page 79 and 80 or February 10, Mr. Perry. Starting at Line 22 on Page 79 down to Line 14 on Page 80.

A How far down.

Q Down to Line 14 on 80.

A Okay.

Q Have you had a chance to read that, sir?

A Yes.

Q You seized some badges and shirts from the Wolfe premises on December 23rd, 1996, did you not?

A Yes.

Q And the reason you seized those badges and shirts were that you were afraid that if you left them there Mr. Wolfe could use them in some future crime, is that not true?

THE COURT: Just for the record it should be indicated that what we're -- you're talking about are the badges are police badges.

MR. MCINTYRE: Yes, sir, I'm sorry.

THE COURT: All right.

A I seized the -- I seized the badges because I knew there had been a prior conviction for impersonating actually the very same police department that the badge represented at that point.

Q Okay. And you were afraid that they'd be used to impersonate a police officer again, is that correct?

A They could be used for anything with respect to --

Q Okay. And as a result of that you seized it, seized them?

A Yes.

Q What authority under the search warrant did you have to seize --

MR. HAVILAND: Objection, argumentative.

MR. MCINTYRE: Your Honor, I'm trying to establish this was a general --

MR. HAVILAND: This search warrant says what it says. I'll stipulate that it did not -- the search warrant does not authorize him to seize badges. Stipulated.

THE COURT: All right.

MR. MCINTYRE: All I'm trying to establish whether or not this officer acted in good faith pursuant to

the search warrant. And my question was, what authority under the search warrant did he have for seizing the badges.

THE COURT: I think we're really talking about whether he acted in good faith in -- in going into that vault and seizing these firearms that are the subject of the proceedings here in my Court. That's the only thing I believe that I'm dealing with in this case, firearms, I believe.

MR. MCINTYRE: Well, but if -- again, Your Honor --

THE COURT: I don't have no marijuana count here in this case is there, I don't believe.

MR. MCINTYRE: I understand --

THE COURT: Strictly a firearms count. I realize the marijuana was suppressed in the State Court, but of course if the matter were prosecuted in the Federal Court, that's an entirely different matter.

MR. MCINTYRE: Your Honor, let me explain. I am trying to establish with this line of questioning that this search, as I argued in my brief, was a textbook example of the general rambling search and that the officers who conducted it had no intention and did not pay any attention to the strictures --

THE COURT: Well, that's argument, but again that --

MR. MCINTYRE: But that why I'm pointing it --

THE COURT: That's -- search may very well -- certainly may be that the search was unauthorized and went too far regarding some items, but not other items. But I'm really concerned with the -- with the search which discovered these firearms and resulted in the seizure of the firearms.

MR. MCINTYRE: Very well, Your Honor. Are you sustaining the prosecutor's objection as to that point?

THE COURT: Well I'm finding -- I'm finding that -- that -- yes.

MR. MCINTYRE: Okay. Your Honor, with that, I would like to -- I have no further questions of Mr. Perry.

* * *

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**CASE NO. 97-50065-1**

**UNITED STATES OF AMERICA,**
***Plaintiff,***

**vs.**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

**Ordered By:** **KENNETH MCINTYRE, ESQ.**

# EVIDENTIARY HEARING

## VOLUME II

**BEFORE THE HONORABLE**
**PAUL V. GADOLA**

July 31, 1998, 8:34 a.m.

**APPEARANCES:**

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Court Recorder: Julie Delling

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

***

Q. All right. And after talking with your wife about this specific inquiry that Mr. Rose and I had made, you called Mr. Rose and told him that your memory had been somewhat refreshed by talking with your wife, is that fair?

A. That's right.

Q. Okay. And it was at that point that you got the invitation to come in and describe your refreshed recollection?

A. That's correct.

Q. Okay. And Judge Hegarty, during that testimony I asked you a series of questions about how you normally go about reviewing an affidavit and deciding whether or not you would sign the search warrant which the affidavit is based upon. Do you recall that?

A. That's correct, yes.

Q. And I--if I recall correctly, sir, you voiced some objection to me cross examining you about a search warrant that was 15 months old, do you remember that?

A. I thought search warrants stood on the four corners of the affidavit.

Q. Right. In fact that's what you said as I recall, it's either up or down based on what's in the affidavit.

A. That was always my understanding.

Q. Okay. Judge Hegarty, you have over the years rejected requests for search warrants because of deficiencies within the affidavit, have you not?

A. I have, to give you a full answer, I have rejected, I have called the police officer back after I've gotten the affidavit and questioned him, and then asked him why in the heavens name he didn't put in the affidavit and they amend the affidavit. Then it gives me an idea why I should issue the warrant.

Q. It's true, is it not, that you testified and that it is your practice that if after reading a search warrant affidavit you find that there are no allegations that any of the stolen material or the property to be searched for had ever been in the place to be searched, that you would reject the request for a search warrant?

A. Unless the information in the affidavit would give me reason to believe that the property to be searched for is in the place to be searched, I would reject the warrant, that's right.

Q. All right. And you've done that, have you not?

A. And I do that, yes.

Q. That's consistent with what you just said that you call people back, wherever the affiants are and say

hey, you didn't meet mustard, here's what I've got to have.

A. I did it two nights ago.

Q. Can you give me your best estimate as to how often you've done that, sir, in the six years?

A. In the beginning very seldom because we had a older group of police officers. Now I do it probably at least once month because we have a huge influx of people now that the--everybody is retiring from the police force.

Q. All right. And Judge Hegarty, do you recall that back in March I asked you to in fact read the entire affidavit that the December 23rd, 1996 search warrant at issue was based upon. Do you recall me asking you to do that?

A. Well I don't know whether or I read it all at one time, but I think I did read it with you, that's right.

Q. Well, do you recall that when you started to read it, I announced what time it was and you made a comment to me about having announced what time you began reading it? Do you remember that?

A. Yes, uh-huh.

Q. And you said at that time, did you not, that you were going to read this affidavit much more carefully then than you did back at your home?

A. That's correct, right.

Q. On December 23rd?

A. Right.

Q. And you did read it more carefully at that time, did you not, sir?

A. I'm sure I did.

Q. You were sitting on the witness stand in front of your friend and colleague Judge Burress when you did that, were you not?

A. That's correct.

Q. And do you recall Judge Hegarty, that I asked you to re-read or read that affidavit to see if you could find anywhere in it that any of the property that you were asked to allow the officer to search for had ever been alleged to have been in the Wolfe home? Do you remember that line of questioning?

A. Not really. I'm sure you probably did, but I'm under oath, I'm going to be a little careful today.

MR. HAVILAND: I'm going to object to that line of questioning for the reasons the Judge has indicated.

Q. Judge, that's why you've got the transcript in front of you. If you would, sir--

MR. HAVILAND: But I don't see the point in refreshing his memory on it. I'll stipulate that the questions were asked and the answers were given as stated in the record which is set before the Court.

MR. MCINTYRE: Okay. That's fine, thank you. And before I move off that subject, does that stipulation include the answer wherein Judge Hegarty--

MR. HAVILAND: It includes every answer that's in the transcript, sir.

THE COURT: Can you refer--

MR. HAVILAND: The entire transcript is in evidence.

THE COURT: What are you referring to in the transcript?

MR. MCINTYRE: Page 44, Your Honor.

THE COURT: Of which day's hearing? Well, I don't have that. That's March 18th hearing?

MR. MCINTYRE: Yeah, that's--that's the problem.

THE COURT: That's in a different book.

MR. HAVILAND: It's--I believe you were given--it should be Volume 8 of the materials that you were given, Your Honor.

THE COURT: Well, I don't have that in front of me.

MR. HAVILAND: Well, maybe he hasn't been supplied with a copy of it yet. I was given it.

THE COURT: I don't have--

MR. MCINTYRE: Your Honor, may I show you?

THE COURT: No, I don't have that.

MR. MCINTYRE: May I show you a copy that I have then?

THE COURT: Well, it would be helpful if you're talking about this transcript. It would be sort of helpful if I had a copy to look at. Well, I've looked at this now.

MR. MCINTYRE: Your Honor, I accept the stipulation. I accept that if I ask him to read that--

THE COURT: Well, I'm just making an observation that it appears that Judge Hegarty is stating that upon re-reading the affidavit he doesn't find any indication that any of the stolen materials were likely to have been within the home, but that insofar as the records were concerned, the documentary evidence, that was quite another matter.

MR. MCINTYRE: Well, you anticipated my next question, Your Honor, which is Page 45 wherein I asked that question. And continuing on through actually Page 47.

THE COURT: Well I'm seeing in 45, I'm seeing this answer, question and answer. Question, and therefore your warrant would not have authorized the officers to go into the home and search for those materials there having been no allegations they were even there, is that correct? Answer, well, taking the entire affidavit as a whole, I would assume that perhaps some of the material would probably be in the home rather than an airplane hangar such as ownership documents, the insurance records, the claim forms, and the contracts.

MR. MCINTYRE: Right. I then go on to ask him about all of those, Your Honor. And as I recall it and the record will say what it says, he agreed that no allegations were made that any of those have been ever in the home except when we got down to the home ownership and then

Judge Burress sustained the prosecutor's objection basically saying that the affidavit speaks for itself.

MR. HAVILAND: And that is my objection today, Your Honor. Mr. McIntyre spent a great deal of time in the State Court hearing cross examining Judge Hegarty--no, he wasn't cross examining Judge Hegarty.

He was arguing with Judge Hegarty about the legal sufficiency of the warrant. That is a determination for the Court to make. There is no point in this examination. he just wants Judge Hegarty to repeat answer that he's already given to improper questions that he already gave in the State Court hearing.

THE COURT: Mr. McIntyre?

MR. MCINTYRE: Your Honor, I'm attempting to lay before this Court testimony which suggests that upon the second reading by this Judge, he found no basis in the affidavit's four corners to support any--

THE COURT: I don't get that impression. I would agree that--that Judge Hegarty in his testimony indicated that there was no information in the affidavit that would lead him to conclude that the stolen materials, that is bales of hay and horses for instance would be found inside the house.

But he qualified it regarding records, insurance claim forms. And of course there was the allegations here of insurance fraud and allegations regarding the sale of the horses. And the type of documents that were looked for

would be veterinary records and so forth and so on which of course would have some bearing on whether horses were present at the premises.

And it seems to me that Judge Hegarty qualified his response. And he was in agreement with you insofar as the fact that there were no allegations in the affidavit indicating that the--that there might be the stolen items inside the house such as bales of hay and horses or golf carts and that sort of thing.

MR. MCINTYRE: Well, Judge--

THE COURT: But it's quite different when the discussion turned to documentary evidence, that is records.

MR. MCINTYRE: Except that at page--

THE COURT: Matter of fact it seems to me that would be more likely that those things would be in the house than out in a barn or in an airplane hangar.

MR. MCINTYRE: I agree with that, Judge.

THE COURT: Go ahead.

MR. MCINTYRE: But if you will, the Court has said that it's read this at Page 45, I asked him about all those records and whether or not there's any allegation in the affidavit that they were ever there and he agrees that they were not. So it isn't just stolen material that he's agreeing there's no assertion they had ever been in the house.

MR. HAVILAND: Judge, my objection is I just want Mr. McIntyre, if he's going to ask this witness

questions, ask him questions that have not already been asked and answered and are already before this Court. Is there something new to be brought out today or isn't there? If there is, then let's get on with it.

MR. MCINTYRE: Judge, I didn't and wouldn't have agreed with Mr. Haviland's proposal or suggestion that by entering the entire transcript of the prior hearing that I am somehow foreclosed from highlighting for this Court what I view to be the principal factors that this Court should consider.

THE COURT: All right. Well, I'll give some latitude, but--

MR. MCINTYRE: Thank you.

THE COURT: It just seems to me that a lot of this is unnecessary, but go ahead.

* * *

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**CASE NO. 97-50065**

**UNITED STATES OF AMERICA,**
***Plaintiff,***

**vs.** **HONORABLE PAUL V. GADOLA**
**U.S. DISTRICT JUDGE**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

---

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Eastern District
of Michigan
Filed 3/10/98

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**DEFENDANT'S MOTION TO SUPPRESS THE FRUITS OF A STATE SEARCH WARRANT**

**Z-1**

**COME NOW**, Ronald N. Wolfe, Sr., Defendant herein, by Kenneth G. McIntyre, his attorney, and pursuant to Rules 41(f) and 12(b)(3) of the Federal Rules of Criminal Procedure, together with Local Rules 1.1(c) and 7.1 of the United States District Court for the Eastern District of Michigan, said Defendant respectfully asks that this Court enter an Order suppressing as evidence in this matter all of the relevant fruits of a December 23, 1996.

* * *

19. Detective Perry and other officers who testified during the Livingston County motion to quash stated that they believed that the search warrant gave them the authority to search anywhere they wished upon the Defendant's premises, and gave them the authority to seize anything that appeared to them to constitute evidence of any criminal activity, and, in Detective Perry's case, anything that might later be used to prove as yet uncharged criminal activity, or rebut defenses raised to pending or future criminal activities.[2]

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The transcripts of the Livingston County motion to quash are not yet available. Therefore, counsel cannot provide this Court with the full background text of these assertions. Counsel requests that he be given that opportunity, once the transcripts are available.

It is the Defendant's contention here, as it is there, that the search conducted at his home was grossly over broad, and accordingly, went far beyond what was authorized by the search warrant, even if the December 19, 1996 affidavit is construed to justify any search of the Defendant's premises on December 23, 1996.

* * *

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assertions. Counsel requests that he be given that opportunity, once the transcripts are available.

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**CASE NO. 97-50065**

**UNITED STATES OF AMERICA,**
***Plaintiff,***

**vs.** **HON. PAUL V. GADOLA**
**U.S. DISTRICT JUDGE**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

**Saul A. Green**
**United States Attorney**
**By: Robert W. Haviland (P25665)**
**Attorneys for Plaintiff**

**Kenneth G. McIntyre (P17449)**
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Eastern District
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Filed 3/10/98

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# DEFENDANT'S BRIEF IN SUPPORT OF HIS MOTION TO SUPPRESS THE FRUITS OF A STATE SEARCH WARRANT

**COMES NOW,** Ronald N. Wolfe, Sr., Defendant herein, by Kenneth G. McIntyre, his attorney, and for his Brief in Support of His Motion to Suppress the Fruits of a State Search Warrant, he states as follows.

* * *

Once at the site of the search, the officers who conducted the search acted at the direction of Detective Perry. They searched for and seized not only a substantial number of firearms, even though the search warrant did not authorize such seizures, but they also indiscriminately seized a substantial number of items and documents which were not described in the search warrant as property to be searched for or seized. Detective Perry, for example, testified, under oath, that it was his practice to seize a great number of documents without examining them, and sort out later whether they would or would not be helpful to support existing prosecutions or future prosecutions (Motion to Suppress, Appendix #3, p 19).

A full development of all of the facts and circumstances concerning the creation of the affidavit, its

presentation to the District Judge, and how broadly the search was conducted is imperative to the resolution of the issues posed by this motion. Accordingly, Defendant respectfully asks that he be permitted to provide a full transcript of the hearing conducted over several days in the Livingston County Circuit Court, and/or to summarize that transcript, as either a substitute for live testimony in support of Defendant's motion, or to augment any testimony authorized by this Court.

* * *

> of the Weaver residence 'would uncover evidence of wrongdoing.' *Gates,* 462 US at 236, 103 S Ct at 233." *Id,* p 1379
>
> The Fourth Amendment provides that:
>
> "... no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." (emphasis added)

*Mapp v Ohio,* 367 US 643,655-656,6 L Ed 2d 1081, 81 S Ct 1684 (1961) extended the protection of the Fourth Amendment to citizens whose homes are searched by state officers.

Even if this Court, after conducting a full evidentiary hearing, and after it applies the above described "substantial basis" test of *Gates v Illinois* to the affidavit at issue, finds that the December 19, 1996 affidavit established probable cause to believe that the fruits or evidence of one (or more) of the criminal acts described in the affidavit was present within a specific location on the Defendant's premises **other than** within the Defendant's home, the existence of probable cause to believe something illegal (or evidence of something illegal) could be seized from somewhere on the Defendant's premises other than in his home, would **not** justify or authorize a search of that home or the gun vault within that home. A landmark United States Supreme Court case supports that conclusion, i.e.:

> "... Just as probable cause to believe that a stolen lawnmower maybe found **in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase**." *Maryland v Garrison,* 480 US 79, 84-85, 94 L Ed 2d 72, 107 S Ct 1013 (1987) [quoting from *United States v Ross,* 456 US 798, 824, 72 L Ed 2d 572, 102 S Ct 2157 (1982)] (emphasis added)

* * *

The language of the Fourth Amendment to the United States Constitution clearly requires that an affidavit offered to justify a governmental invasion of one's most private interests, his home and the papers or effects within it, must describe with particularity the **place to be searched and the things to be seized**. This requirement means something more than a blanket authorization to search the entire premises of a 50+ acre parcel and every room within every building located thereon.

The Warrant Clause of the Fourth Amendment has been a:

"... valued part of our constitutional law for decades .... It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are part of any system of law enforcement."

*Arkansas v Sanders, supra,* p. 758--quoting from *Coolidge v New Hampshire,* 403 US 443, 29 L Ed 2d 564, 91 S Ct 2022 (1971)

What prompted the constitutional protection of the Fourth Amendment against general, unreasonable searches and seizures is not a mystery, i.e.:

> "It cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England. These writs, which were issued on executive rater than judicial authority, granted **sweeping power** to customs officials and other agents of the King to search **at large** for smuggled goods. Though the authority to search granted by the writs was not limited to the home, searches conducted pursuant to them often were carried out in private residences. See generally *Stanford v Texas,* 379 US 476, 481-485, 13 L Ed 2d 431, 85 S Ct 506 (1965); *Marcus v Search Warrant,* 367 US 717, 724-729, 6 L Ed 2d 1127, 81 S Ct 1708 (1961); *Frank v Maryland,* 359 US 360,3 L Ed 2d 877, 795 Ct 804 (1959)."
>
> *United States v Chadwick,* 433 US 1, 7-8, 53 L Ed 2d 538, 97 S Ct 2476 (1977) (emphasis added)

These general principles beget yet another black letter rule concerning the particularity requirements of search warrants, i.e.:

"(T)he items to be seized must be described (in the warrant) **with sufficient particularity such that the executing officer is left with no discretion to decide what may be seized**."
*Marron v United States,* 275 US 192, 196, 48 S Ct 74, 72 L Ed 231 (1927). *See also, Roaden v Kentucky,* 413 US 496, 502,37 L Ed 2d 757, 93 S Ct 2796 (1973) and *Lo-Ji Sales, Inc. v New York,* 442 US 319, 325-326, 60 L Ed 2d 920, 99 S Ct 2319 (1979)

In *United States v Gardner,* 537 F2d 861 (6th Cir, 1976), a search warrant which directed the executing officer to search for and seize "... all firearms and ammunition" was held to be an insufficient basis for seizing a sawed-off shotgun, even though the affidavit established probable cause to search for a different gun, i.e., a .38 caliber pistol. The rationale of the *Gardner* court was that:

"The Fourth Amendment requires warrants to particularly describe the items to be seized. Warrants may not authorize general searches, nor may they permit police officers to exercise undirected discretion in determining what to seize. *Berger v New York,* 388 US 41, 58, 87 S Ct 1873, 18 L Ed 2d 1040 (1967); *United States v Sanchez,* 509 F2d 886, 889 (6th Cir, 1975)." *Id.,* p. 862

*See also, In Re Lafayette Academy,* 610 F2d 1, 3 (1st Cir, 1979), wherein a warrant which authorized the seizure of "all documents" which appeared (to the executing officer) to constitute evidence of violations of a number of federal laws was held to be overly broad.

When, as here, no specific allegation is made in the affidavit tendered in support of a request for a search warrant that any item which is the fruit of or evidence of any particular crime described in the affidavit was ever in the Defendant's home or gun vault, the particularity requirements for a search warrant clearly cannot be met and were not met as regards the Defendant's home and the gun vault within that home. Similarly, vague statements about the presence of weapons within the home--without any claim that any specific weapon therein had been used to violate any law, and without any allegation that any gun law had been violated by their presence within the Defendant's home--could not justify the search for or seizure of any weapon or record of weapon from the Defendant's home or the gun vault therein.

Finally, **affirmative** allegations that the Defendant resided at the residence to be searched certainly cannot provide a basis for searching throughout his home to establish that he owned the home or resided there--thereby allowing the officers to gain entrance into the Defendant's home, and to seize whatever they **then** concluded was evidence of illegal activity.

* * *

## Conclusion

The December 23, 1996 search of the Defendant's entire premises was a text book example of the sort of general search that the Fourth Amendment was designed to prevent. As regards the specific weapons at issue in this case, Defendant respectfully contends that Detective Perry purposely failed to describe the existence of the gun vault in his affidavit, because he wanted to gain access to it via the "entire premises" language presented to Judge Hegarty. and he feared that if he sought permission to search the gun vault he would have been required to allege facts he did not have about alleged illegal possession of the weapons therein. He had set up the strategy of seizing the guns within the vault and turning them over to Special Agent Evans before the search warrant was obtained. Finding marijuana plants within the gun vault was not expected, but their presence does not justify seizing all of the weapons within the gun vault, so as to avow a federal agent to inspect them at some future date-either as a consequence of the scope of the search warrant itself, or pursuant to any exigent circumstance that was in place on December 23, 1996 at the Defendant's home.

* * *

**STATE OF MICHIGAN IN THE CIRCUIT COURT**
**FOR THE COUNTY OF LIVINGSTON**

**PEOPLE OF THE STATE OF MICHIGAN,**
***Plaintiff,***

**Case No. 97-9961-FY**
**(Manufacture of Marijuana)**
**vs. Hon. Daniel A. Burress**

**RONALD N. WOLFE, SR.**
***Defendant.***

**David L. Morse (P33093)**
**Livingston County Prosecutor**
**By: Daniel W. Rose (P40459)**
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**Donald E. Martin (P17138)**
**Attorney for Defendant Marie Wolfe**

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**AFFIDAVIT OF RONALD N. WOLFE. SR.**

**State of Michigan**
**County of Ingham**

I, Ronald N. Wolfe, Sr. being first duly sworn, depose and state as follows:

1. My name is Ronald N. Wolfe, Sr., I am 44 years old. My date of birth is June 19, 1953.

2. Inside at 5753 Fisher Road in Howell, Livingston County, Michigan. I have openly resided at that address since approximately 1994. I notified police officers employed by the Michigan State Police of my occupancy at that address on September 24, 1994. On approximately November 15, 1995, my wife and I, in our names, applied for an occupancy permit for the premises at 5753 Fisher Road. That application was immediately granted by the Livingston County Building Department.

3. Prior to December 19, 1996, I was registered with the United States Government as a Class III firearms dealer. I was also registered with the State of Michigan as a firearms dealer. These registrations meant that I was entitled to own and possess firearms at my home located at 5753 Fisher Road on and before December 23,1996, so long as I alone maintained the weapons in a secure location.

4. Prior to December 23, 1996, I maintained firearms within a secure, locked, walk-in vault, which is located in the basement of my home.

5. Prior to December 23,1996, I had applied for and been granted licenses to carry concealed weapons by the State of Michigan and by the State of Florida.

6. Prior to December 23, 1996, I was a titled owner of the premises located at 5753 Fisher Road, and had paid real estate property taxes in my name in connection with that ownership interest.

7. During the early morning hours of December 23, 1996, several police officers came to my home with a search warrant.

8. I was placed under arrest before the search of my premises was conducted. My motor vehicle operator's licenses for Michigan and Florida, my pilot's license, and my Concealed Weapons Permits for Michigan and Florida were taken from me at the time I was placed under arrest.

9. I was transported to the Livingston County Jail after I was arrested a my home on December 23,1996.

10. While I was being detained at the Livingston County Jail, I was told that unless I provided the police officers who were conducting a search of my home with the combination of the lock which secured the gun vault in my basement, they (the police officers) would blow open the vault in order to gain access to it. I asked to consult with my attorney before making a decision of whether to provide the combination to my gun vault That request was denied. Because I knew the vault contained valuable weapons, as well as several rounds of "live" ammunition, and because I believed my wife to still be at my home, I was fearful that unless I provided the officers with the combination to the safe, her life could be endangered, the lives of the officers could be endangered, and the weapons within the safe, some of which I did not own, could be damaged. As a result of those fears, I provided the vault's combination to the jailer who had demanded that I do so.

11. I believe that there were several documents at my home on December 23, 1996, including receipts, which would have assisted me to defend several of the charges of larceny which have been filed against me, my son, and my wife. The Prosecutor has not returned all of those documents or copies of the same to me as of this date.

12. Based upon statements made in my presence during an August 29, 1997 court ordered meeting, wherein the prosecutor's office was supposed to account for all items seized from my person and home on December 23, 1996, I believe Detective Perry did not provide complete list of, or copies of, all materials taken from me by the police officers who searched my home. I also believe that some of the materials seized from my home and premises on December 23,1996 were not retained by the Sheriff's Department or the prosecutor's office.

Further, affiant saith not.

/s/ Ronald N. Wolfe, Sr.
**Ronald N. Wolfe, Sr.**

Subscribed and sworn to before me on this 5th day of November, 1997.

/s/ Nancy Jo Gibson
Nancy Jo Gibson, Notary Public
Ingham County, Michigan
My commission expires: March 9, 2000

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**Southern Division**

**UNITED STATES OF AMERICA,**
***Plaintiff,***

**Case No. 97-50065**

**vs.** **Hon. Paul V. Gadola**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***


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# DEFENDANT'S AMENDED AND SUPPLEMENTAL MOTION TO SUPPRESS THE FRUITS OF A STATE SEARCH WARRANT


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Eastern District
of Michigan
Filed 9/30/98


Dated: September 30, 1998

* * *

## VI.

## DID THE SEARCH WARRANT AND AFFIDAVIT DESCRIBE THE PROPERTY TO BE SEARCHED FOR WITH PARTICULARITY TO SATISFY THE REQUIREMENTS OF FOURTH AMENDMENT?

The language of the search warrant in which the property to be searched for and seized, if found, was "specifically" described as:

> "Documents or evidence indicative of the ownership or occupancy of the above premises; insurance records including contracts, claim forms and payment forms; bales of hay; golf carts; records relating to building materials for the structures on the premises; shingle samples; building material samples; photographs; records relating to the purchase, ownership or registration of firearms; records relating to the possession, ownership or registration of vehicles; records or evidence relating to horse ownerships, sales or veterinary treatment."

Defendant contends that the above-described language was so general as to each of the 11 different types of property described therein, that if failed to provide the officers executing the search of the Defendant's entire residence, and all containers therein, as they did, under the guise of

looking for items which were never identified in the affidavit as contraband or as evidence of wrongdoing.

This is particularly true with respect to the property described in the search warrant, which was said to be in the form of records or documents.

For example, the language of the search warrant did not direct the executing officers to limit theft search for "documents or evidence indicative of ownership or occupancy" to:

(a) any specific area of the "entire premises;" or

(b) to a point in time when such "evidence" was found, thereby permitting the officers to search a locked gun vault for documents bearing the Defendant's name and address, even though the affidavit had affirmatively alleged that the searching officer was satisfied that the Defendant in fact owned and occupied the premises, and even though other documents bearing the Defendant's name and address may have already been found before the gun vault was broken into and searched.

Because the search warrant authorized a search of the "entire premises" for any "insurance records including contracts, claim forms and payment forms," the seizing

officers were provided with no direction as to which insurance records, contracts, claim and/or payment forms they were to seize. This is so, even though the affidavit described a specific insurance fraud, allegedly related to a claim for lost windows in 1994, because the language of the search warrant did not limit the executing officers (some of whom had never read the affidavit or search warrant) to searching for insurance documents related to that "particular" purported fraudulent claim.

As regards the "bales of hay" described in the search warrant, again, no distinction was drawn in the language of the search warrant between bales of hay located at any specific location on the premises, or to bales of hay with a unique "funny" knot within the twin holding together, as described by the complainant in that theft--several months before the instant search. The executing officers were simply told, per the language of the search warrant, that they could seize all bales of hay found anywhere upon the entire premises of the Defendant.[3]

As to "golf carts" described as property to be seized in the search warrant, again, no description of which (of two) golf carts found on the Defendant's premises on December 23, 1996 was to be seized was provided to the

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[3]In fact, they did just that, and gave all of the hay they seized to the complainant--on the very day of the search--thereby violating the requirements of MCLA 780.655 as to that property (02/10/98 Tr, p 133).

seizing officers. They were free to seize both carts, even though the affidavit affirmatively stated that but one stolen cart had ever been taken to the Defendant's premises. Also, apropos to the issue of how broadly the search warrant was executed, the seizing officers seized both of the golf carts they found on the Defendant's premises on December 23, 1996, and they turned both of them over to the complainant before any trial involving those carts was ever convened-- again in violation of MCLA 780.655.

As regards records relating to building materials for the structures on the premises, shingle samples and building material samples, again, no distinction as to which records or samples were to be searched for and seized was set forth in the search warrant-- even though the affidavit had described specific shingles and specific building materials which had allegedly been stolen several months before the search, and which had purportedly been used to erect a specific pole barn on the Defendant's premises.

Looking forward again to the issue of how broadly the executing officers implemented their search, Detective Perry testified that he felt the language of the search warrant authorized him to seize all documents which would either support or not support the alleged theft of any building materials (02/11/98 Tr, pp 31-32). He also said that his authority to search the "entire premises" gave him the authority to search every building on the premises, and every container thereon, unless it was so small it could not

hold a single receipt (02/10/98 Tr, pp 29-31). Thus, a description of specific stolen materials in the affidavit begot a general directive to seize all building materials documents, receipts, etc., which, in turn, begot a seizure by the executing officers of any records or receipts having to do with any building materials found anywhere on the Defendant's premises.

The search warrant also authorized the seizing officers to seize "photographs" from anywhere on the Defendant's premises. No effort was made to limit the officers to seizing photographs that had something--anything--to do with any of the crimes described in the affidavit. [4]

As regards records relating to the purchase, ownership or registration of firearms, again, no specific firearm was described in the search warrant, and no

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[4]To the argument that the sweeping language of the search warrant was "harmless," because no photographs or other records were seized, or have, as yet, been offered in evidence, Defendant's contention is that such an argument misses the point. When a broadly worded search warrant is used as a basis to obtain entry into a man's home, thereby vesting the officer with an opportunity to seize things in "plain view" (especially things he expected to be there, like weapons in a federally licensed firearms dealer's gun vault), it simply is not a proper response to say that the Defendant was not harmed by such non-specific language.

indication was offered in either the search warrant or the affidavit that any such record would be found anywhere in the Defendant's home. The best that the County Prosecutor and/or the Government has been able to come up with to justify this sort of general language in the search warrant is that the informants described Mr. Wolfe as having a pistol during the theft of hay, and Mr. Wolfe's son having a .22 caliber rifle during the golf cart theft. Nowhere in the affidavit is there any assertion that either of these weapons was/were:

(a) in the Defendant's home on December 23, 1996, or at any time prior to that date;

(b) registered to the Defendant; or

(c) that any record of purchase, ownership, or registration of either such weapon was, or ever had been, in the Defendant's home.

The plain fact is that Mr. Garber, as he testified, and as found by Judge Burress, meant to include a request within the search warrant which would have authorized the seizing officers to search for and seize firearms from the Wolfe premises on December 23, 1996 (please see Judge Burress' Opinion, p 32 and 02 /23/98 Tr, pp 44,57-58).

As regards the search warrant's directive to search for"ownership or registration of vehicles," again, no specific vehicle was described, thereby authorizing the seizing

officers to search the Defendant's entire premises for such documents, without any directive as to which vehicle registration they were looking for and/or why they were to seize them.

Finally, although the affidavit described the theft of two (2) specific horses, the search warrant authorized the seizing officers to look for and seize (anywhere on the Defendant's premises) any records or evidence relating to ownership of any horse, or sales/veterinary records for any horse.

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## VIII.

## WAS THE EXECUTION OF THE SEARCH AT ISSUE SO OVER BROAD AS TO REQUIRE THE SUPPRESSION OF ALL OF THE EVIDENCE SEIZED FROM THE DEFENDANT'S HOME ON DECEMBER 23, 1996?

During his questioning of Detective Perry on July 31, 1998, defense counsel sought to establish that the December 23, 1996 search at the Defendant's premises was over broad, i.e., "... a textbook example of the general, rambling search, and that the officers who conducted it had no intention and did not pay any attention to the strictures ..." of what the scope of the search should have been (07/31/98 Tr, pp 149-154).

This Court ruled that while the search may have gone too far as to some items, what it was concerned with was whether the search that resulted in the seizure of the firearms was improper. Id, p 154. This Court, therefore, sustained the Prosecutor's objection to that line of questioning, and it was not pursued further. Id, p 154.

Because of that ruling, those portions of the transcript from Judge Burress' court, wherein some of the officers who participated in the search described how they were briefed about the scope of the search, whether they

had read either the affidavit or the search warrant before they began to participate in the search, and what they were told by Detective Perry about the scope of the search, were not provided to this Court. Nor were any of Detective Perry's or Detective Swackhammer's statements about this issue argued in Defendant's August 24, 1998 Proposed Findings of Fact and Conclusions of Law. To have done so would have been a useless effort, since the Court had already expressed an unwillingness to consider such evidence.

Defendant, in his original March 10, 1998 Brief cited Supreme Court cases in which the infamous and overly broad "writs of assistance" employed by the English in pre-revolutionary war times were said to have been the major reason for the adoption of the Fourth Amendment (please see Defendant's March 10, 1998 Brief, pp 10-11).

Because there is a body of law which holds that even if an affidavit contains sufficient facts to justify a finding of probable cause to believe that particular items of property are likely to be found at a particular location upon a suspect's property, an entire search and seizure may be deemed unreasonable, including items for which there was probable cause to search for and seize, if the executing officers flagrantly disregard the scope of their authority in executing the search, Defendant wishes to preserve this issue for appeal. To do so may require that this Court consider the evidence offered upon this issue in Judge

Burress' court, and permit the Defendant, through his counsel, to cross-examine Detective Perry upon this issue.

Before counsel submits the remainder of the transcripts created in Judge Burress' courtroom, and seeks to secure an opportunity to recall Detective Perry, this Court is herewith being respectfully asked if it intended, in its September 1, 1998 Opinion, to address and resolve this issue. If it did not, then counsel respectfully asks that the Court permit him to supplement the record by tendering the remainder of the relevant transcripts, and/or to reopen the proofs to cover this issue in sufficient detail to allow the Court to rule upon it.

**IX.**

**DID DETECTIVE PERRY'S DEMAND FOR THE COMBINATION OF THE GUN VAULT, HIS STATEMENT THAT HE WOULD FORCE OPEN THE DOOR TO THE VAULT IF THAT COMBINATION WAS NOT PROVIDED, AND HIS REFUSAL TO PERMIT THE DEFENDANT TO CONSULT WITH HIS ATTORNEY BEFORE DECIDING WHETHER TO PROVIDE THAT COMBINATION, DEPRIVE DEFENDANT OF HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, AND OF HIS SIXTH AMENDMENT**

**RIGHT TO COUNSEL, SO AS TO REQUIRE THAT THE FRUITS OF THAT COMBINATION HAVING BEEN SO PROVIDED MUST BE SUPPRESSED?**

This issue is related to Defendant's original contention that he did not voluntarily consent to Detective Perry's entry into his (Defendant's) locked gun vault. That contention was made in anticipation of an argument that even if the search warrant was defective, the Defendant nevertheless consented to the search of his gun vault.

Obviously, the Government did not contend that the Defendant consented to that entry. Instead, it contended that the entry into the vault was justified by the language of the affidavit and search warrant, and, presumably, that even if the combination to the safe was obtained in violation of the Defendant's Fifth and Sixth Amendment rights, the fruits of seizures of the contents of the gun vault were not causally related to those constitutional violations.

Defendant obviously contends that the search warrant did not authorize Detective Perry's entry into the gun vault and, more particularly, it did not justify Detective Perry placing himself in a position to lawfully see the contents of the gun vault, so as to invoke the "plain view" doctrine which this Court has now held justified the seizure of the weapons at issue herein.

There cannot be any real dispute that the Defendant was "in custody' when he was asked to provide the combination to the safe, i.e., he was in a cell at the Livingston County Jail. Nor can there be any contention that he was warned of his "Miranda" rights when the combination to the gun vault was demanded by Detective Perry. The Defendant's November 5, 1997 affidavit, which was attached to his March 10, 1998 brief, establishes that the reason he provided the combination to Detective Perry was his fear that the safe would be "blown" open if he did not, and that such a means of entry could have endangered the lives of his wife and the officers involved. He asked to speak with his attorney before providing that combination, but that request was refused.

In short, the Defendant's act of providing the combination to the gun vault door to Detective Perry was secured from him in direct violation of his right to counseL and because of the presence of marijuana in the gun vault, plus the weapons the instant Indictment is based upon, it also provided a link in the chain of obtaining incriminating evidence against him.

Because this Court has ruled that the search warrant provided a valid basis for Detective Perry to enter the gun vault and, even if it did not, he relied in "good faith" upon that warrant as a basis to enter the gun vault, thereby allowing him to satisfy the first requirement of the plain view doctrine, and because counsel is satisfied that both of

these issues are preserved for appeal, a detailed legal analysis of the impact of the illegally obtained information, vis-a-vis the combination to the gun vault upon the admissibility of the "fruits" of that information will not be attempted herein. However, under the rationale of *Brown v Illinois*, 422 US 590, 45 L Ed 2d 416,95 S Ct 2254 (1975), the taint of the illegally obtained evidence, i.e., the combination to the gun vault, clearly was not purged by anything that occurred between the time that information was obtained, and the entry into the gun vault. Whether Detective Perry would have in fact "blown" the door on the gun vault or not, had the Defendant not involuntarily provided that information to him, cannot be known. But there can be no question that Detective Perry exploited the illegally obtained information, vis-a-vis the combination to the gun vault, and that the firearms and marijuana the Government will seek to offer in evidence were obtained as a direct result of that exploitation. Accordingly, Defendant respectfully asks that this Court hold that neither the firearms nor the marijuana may be offered in evidence in this case, as there is no "good faith" rule which pertains to evidence obtained in violation of the Fifth and Sixth Amendments.

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**UNITED STATES OF AMERICA,**
***Plaintiff,***

**Case No. 97-50065**

**vs.** **Hon. Paul V. Gadola**

**RONALD NAPOLEON WOLFE, SR.**
***Defendant.***

Eastern District
of Michigan
Filed 10/23/98

**RESPONSE TO DEFENDANT'S AMENDED AND SUPPLEMENTAL MOTION TO SUPPRESS**

For the reasons stated in the brief submitted with this response, the United States opposes Defendant's Amended and Supplemental Motion to Suppress the Fruits of a State Search Warrant.

SAUL A. GREEN
United States Attorney

Dated: 10/23/98

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**BRIEF**

This case began on December 3, 1997, when a grand jury returned an indictment charging defendant with 21 federal firearms violations, each count being based on weapons seized by state officers during the execution of a state search warrant on December 21, 1996 at defendants residence. Defendant promptly moved to suppress from evidence all the seized firearms, alleging the warrant was invalidly issued and executed for a host of reasons. The court conducted an extensive evidentiary hearing on July 30-31, 1998; received in evidence the testimony in a State.

* * *

*United States v. Johnson,* 12 F.3d 827 (8th Cir. 1994)("a search and seizure conducted by state authorities is evaluated by application of federal Fourth Amendment standards"); *United States v. Smith,* 9 F.3d 1007 (2d Cir. 1993)(fact that state search warrant had been secured by local police in violation of New York law was not relevant m federal prosecution); and *United States v. Eastland,* 989F.2d760 (5th Cir. 1993("strong policy considerations militate against the exclusion of evidence obtained in violation of state law"; "such a rule would disrupt uniformity of evidentiary rules among federal courts, and

involve them in difficult interpretations of state statutory and constitutional law").

The remainder of defendant's "Amended and Supplemental Motion" discusses issues he believes were not clearly resolved by the court's earlier opinion and order. As noted above, the government believes these issues should be considered only as to the marijuana.

The first such issue is whether the search warrant described "the Property to be Searched for with Sufficient Particularity to Satisfy the Requirements of the Fourth Amendment." Defendant's motion at 14. The government believes the court previously resolved this issue (albeit by implication) against the defendant in the litigation over the seized firearms; the court now may simply state explicitly that its findings apply to the marijuana that is the subject of the only new charge.

The second such issue is whether the warrant described "the Place to be Searched with Sufficient particularity to Satisfy the Requirements of the Fourth Amendment?" Defendant's motion at 19. In essence, defendant is merely repeating his claim that there was no basis in the affidavit justifying a search of the defendant's **residence**, as opposed to outbuildings. The court clearly resolved this issue adversely to defendant in its prior opinion and order dealing with the firearms. There is no reason why that holding should not apply equally to the

marijuana that was found in the same hidden vault where the firearms were found.

Third, defendant argues the execution of the warrant was "So Over Broad as to Require the Suppression of All of the Evidence Seized from the Defendant's Home on December 23, 1996." Defendants motion at 23. Again, the issue should be considered only as to the marijuana; it was not adequately presented as to the firearms in defendant's prior motions to suppress. But even now defendant does not allege what actions of the executing officers should be held to require suppression of the marijuana. Unless and until he sets forth factual claims that would justify suppression, there is no need for an evidentiary hearing and no need for the court to consider the matter. Defendant's mere unsupported assertion that the execution of the warrant was overly broad does not justify an order suppressing the marijuana from evidence.

Finally, at page 25 of his motion defendant argues the marijuana and firearms should be suppressed because the state officers obtained the combination to his hidden vault in violation of his Sixth Amendment right to counsel and his Fifth Amendment right not to incriminate himself. Defendant cites no case, and the government is aware of none, holding that evidence seized during execution of a search warrant should be suppressed because it was found in a locked container which the government could legally have broken, but did not, because the defendant agreed to

reveal the combination. It may be assumed *arguendo* that the custodial "interrogation" of the defendant violated his right to counsel. Nevertheless, the fact that the government could legally have destroyed the door to gain access to the vault means that the "inevitable discovery doctrine" authorizes admission of the evidence found within. *See, e.g.. Nix v. Williams,* 467 U.S. 431 (1984), where the location and condition of a murder victim's body was held admissible even

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**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
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**UNITED STATES OF AMERICA,**
***Plaintiff,***

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**Hon. Paul V. Gadola**

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***Defendant.***

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## DEFENDANT'S RESPONSE TO THE GOVERNMENT'S OCTOBER 23, 1998 RESPONSE TO DEFENDANT'S AMENDED AND SUPPLEMENTAL MOTION TO SUPPRESS

**COMES NOW,** Ronald N. Wolfe, Sr., Defendant herein, by Kenneth G. McIntyre, one of his attorneys, and for his Response to the Government's October 23, 1998 submission, he states as follows:

* * *

**(2) The particularity and overly broad search issues.**

The Government's response to the Defendant's efforts to make certain that these issues will be considered "ripe" for appeal is troubling.

**(a) Particularity of property to be searched for and seized.**

As regards the question of whether this Court's September 1, 1998 Opinion and Order addressed the issue of whether the search warrant's description of the property to be searched for and seized met the particularity requirements of the Fourth Amendment, the Government's response was that it believes that the Court did so "(albeit by implication)," and that the Court:

"... now may simply state explicitly that its findings apply to the marijuana that is the subject of the only new charge."
(Government's 10/23/98 Response, p. 5)

The Defendant does not wish to have the Court of Appeals either guess at what the Court's ruling was upon this issue, or, worse, to find that the Defendant did not sufficiently preserve it by not being persistent enough to cause this Court to directly address this issue. The language of the search warrant which described the property to be searched far and seized is what it is. Defendant raised the issue of the lack of particularity, vis-a-vis that language, at pages 10 to 12 of its March 10, 1998 brief. He reiterated that contention in section VI. of his September 30, 1998 motion, and he has offered additional legal authority upon that issue in his attached brief. No new proofs need be taken upon this issue. If, as the Government contends, this Court intended to resolve this issue in its September 1, 1998 Opinion by implication, all that need be done now is for this Court to specify its legal conclusions as to this issue. If this Court did not intend to address this issue, then obviously, Defendant respectfully asks that it do so, and that it hold:

(1) that the language was not particular enough to permit the officers who executed the warrant to be able to distinguish that

which could have been seized under the warrant, and that which could not; and

(2) that because of the infirmity, the search warrant was deficient and could not form a basis for conducting the search which ultimately yielded the evidence the federal Indictment is based upon.

**(b) Particularity of the place to be searched.**

As to this issue, the Government contends that this Court clearly resolved this issue by ruling that the officers had the right, under the search warrant to search the Defendant's residence (Government's 10/23/98 Response, pp 5-6). As stated by defense counsel in his September 30, 1998 motion (at pages 22 to 23), if this Court, by the virtue of conclusions it described at pages 25 to 28 of its September 1, 1998 Opinion and Order (or by any other legal conclusions set forth anywhere else within that Opinion and Order) intended to hold that the language of the affidavit contained sufficient facts to permit a finding that there was probable cause to believe that evidence of illegal activity in the form of contraband, fruits, instrumentalities and/or "mere evidence" of wrongdoing was likely to be found anywhere upon the "entire premises" of the Wolfe property, then this issue has indeed been

preserved for appeal. However, if the Court did not intend to make that finding, counsel believes that it must address this issue in order to make a finding upon it, so that if the finding is adverse to the Defendant's contention, he will have preserved it for appellate review. Additional cases are included upon this issue in the attached brief.

**(c) Overly broad execution of the Search Warrant.**

The Government's response to this issue is particularly troubling. It contends that it was not adequately presented in the Defendant's prior motion, and that "even now" the Defendant has failed to allege what actions of the executing officers should be held to require suppression of the marijuana (Government's 10/23/98 Response, p 6). The Defendant did raise the overly broad nature of the executing officers' search in his original motion and brief as a part of his challenge to the general nature of the search, i.e., in Issue 2 of his original brief, and in his conclusion to that brief. Moreover, during the July 30-31, 1998 hearing before this Court, counsel's efforts to elicit testimony from Detective Perry upon this very issue were objected to by counsel for the Government, and were prohibited by a ruling by this Court (Defendant's 09/30/98 Motion, p 23). The Government then complains that:

> "Unless and until he (Defendant) sets forth factual claims that would justify suppression, there is no need for an evidentiary hearing and no need for the court to consider the matter."
> (Government's 10/23/98 Response, p. 6)

Fair enough. Counsel for the Defendant, in the brief attached to this response, has described several facts which bear directly upon the issue of whether the search, as conducted, was overly broad. These facts are taken from the transcript made of the hearing in Judge Burress' court, and include references to testimony offered by officers whose transcripts from those hearings were **not** provided to this Court after July-31, 1998, because of this Court's ruling that it did not wish to hear such evidence. Counsel also believes that he should be entitled to question Mr. Perry and these other officers in this Court, in order to make a complete factual record upon this issue.

**(3) The consent/Miranda issue.**

As noted above, defense counsel was not made aware of the Government's position upon this issue until after lie had filed his original March 10, 1998 motion. The Government's position now appears to be that they do not contest the Defendant's assertion that he was neither warned of nor waived his "Miranda" rights prior to providing that combination, and therefore, the Government

does not and will not contend that the Defendant voluntarily provided that combination to Detective Perry. Instead, it appears from the Government'S October 23, 1998 response that they contend that despite that denial of the Defendant's Sixth Amendment right to counsel, the fruits of the search of the gun vault need not be suppressed because the firearms and marijuana would have inevitably" been discovered because the officers, in executing the search warrant, would have gained entrance into the vault even if Mr. Wolfe had refused to provide the combination to the gun vault. Defense counsel has responded to that contention in the attached brief, and respectfully asks this Court to rule upon this issue, so as to preserve it for appeal.

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

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**UNITED STATES OF AMERICA,**

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# DEFENDANT'S BRIEF IN SUPPORT OF HIS RESPONSE TO THE GOVERNMENT'S OCTOBER 23, 1998 RESPONSE TO DEFENDANT'S AMENDED AND SUPPLEMENTAL MOTION TO SUPPRESS

**COMES NOW,** Ronald N. Wolfe, Sr., Defendant herein, by Kenneth G. McIntyre, one of his attorneys, and for his Brief in Support of his Response to the Government's October 23, 1998 submission, he states as follows:

## Issue 1

## DID THE DECEMBER 23, 1996 SEARCH WARRANT'S DESCRIPTION OF THE PROPERTY TO BE SEARCHED FOR AND SEIZED MEET THE "PARTICULARITY" REQUIREMENT OF THE FOURTH AMENDMENT?

The Defendant has contended from December 23, 1996, that the search of his home was illegal, overly broad, and, without knowing the legal significance of the term, "a general exploratory search" of the type abhorred by the colonists who added the Fourth Amendment to our Constitution. Armed police officers entered the Defendant's home, forced him and his wife to lay on the floor at gunpoint, and after arresting and removing Mr. Wolfe from his home, proceeded to search his entire home, his vehicles, and his outbuildings for eight plus (8+) hours. They seized thousands of pages of checks, documents, etc., and seized a wide variety of objects, including all of his firearms and other items of property without (ever) filing an appropriate return in which the items seized were described. Based upon that search, a second search warrant was obtained, which was executed at his home when no one was initially home, and numerous criminal charges, including the instant federal charges, have been filed against him, all as a direct result of the original December 23, 1996 search.

As previously established, the December 23, 1996 search was conducted pursuant to a search warrant and affidavit prepared in an unhurried fashion by an experienced prosecutor, Mr. Garber, and was based primarily upon information provided to him by the affiant, Detective Allan Perry, over a period of several days before the six (6) page affidavit and the search warrant were presented to Judge

Hegarty at his home at approximately 7:00 a.m. on December 23, 1996. Judge Hegarty had just emerged from his morning shower when he was provided wit the affidavit and search warrant. He reviewed the affidavit for five (5) minutes, and signed the search warrant without asking any questions or making any changes. That search warrant directed the officers who executed it to search Mr. Wolfe's "entire premises," including his home, two (2) pole barns, and a gray airplane hangar thereon. It directed the officers to look for and seize:

(1) "documents or evidence indicative of ownership or occupancy of the above premises;"

(2) "insurance records including contracts, claim forms and payment forms;"

(3) "bales of hay;"

(4) "golf carts;"

(5) "records relating to building materials for the structures on the premises;"

(6) "shingle samples;"

(7) "building material samples;"

(8) "photographs;"

(9) "records relating to the purchase, ownership or registration of firearms;"

(10) "records relating to the possession, ownership or registration of vehicles;" and

(11) "records or evidence relating to horse ownership, sales or veterinary treatment."

The search warrant's pre-printed language stated that the affidavit was to be "attached" to the search warrant. It is not known whether it was, but testimony was offered that the Defendant's wife was provided with a copy of both the search warrant and the affidavit early in the search, i.e., after the Defendant had been rested on a separate warrant and taken from his home to the county jail.

It is the Defendant's contention that the above quoted language directing the executing officers to seize what is described therein, failed to provide the officers with sufficient pre-search criterion or guidelines to allow them to distinguish between objects which conceivably or arguably could be said to constitute contraband, fruits of crime or evidence of crime, and objects which were not--thereby requiring and/or permitting the officers to exercise their

own individual discretion in deciding what property was to be seized, and what was not to be seized.[1]

Because of the overly broad language used to describe what property was to be seized, wholly apart from how the search was executed, Defendant contends that the search warrant and, therefore, the entire search, was invalid, and that all of the property seized on December 23, 1996 was seized in violation of the constitutional protection provided byte warrant requirements of the Fourth Amendment to the United States Constitution.

Those constitutional protection were succinctly described in Coolidge v New Hampshire, 403 US 443,467, 29 L Ed 2d 564, 91 S Ct 2022 (1971), as follows:

> "The rationale for the 'plain view' exception is evident if we keep in mind **the two distinct**

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[1]As described in Issue 3 below, the executing officers, particularly Detective Perry conducted the search pursuant to a practice of simply taking anything which they felt might serve to be useful in prosecuting the Defendant for crimes described in the affidavit, and for crimes not described in the affidavit, including "evidence" which might permit them to prevent possible future crimes, which might permit them to rebut possible defenses raised by the Defendant if charged with, as yet, uncharged crimes, or might permit them to verify or rebut information provided to them by informants who had previously provided them information about Mr. Wolfe.

> **constitutional protection served by the warrant requirement.** First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. The premise here is that *any* intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity. *See, e.g., McDonald v United States,* 335 US 451,93 L Ed 153, 69 S Ct 191; *Warden v Hayden,* 387 US 294, 18 L Ed 2d 782, 87 S Ct 1642; *Katz v United States,* 389 US 347, 19 L Ed 2d 576, 88 S Ct 507; *Chimel v California,* 395 US, at 761-762, 23 L Ed 2d, at 692, 693. **The second, distinct objective is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings.** See, e.g., *Boyd v United States,* 116 US, at 624-630, 29 L Ed, at 748-751;

In both of these cases, the affidavit established that a much smaller number of objects than were seized were in fact illegal, but because of the non-particularized description of property to be seized, the seizure of all but the items for which there was probable cause to seize was held invalid.[7]

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[7]Since none of the items at issue in this case, i.e., firearms or marijuana, were even mentioned in the affidavit or search warrant, the "redaction" rulings to the effect that those items for which there was adequate probable cause to search for need not be suppressed is not pertinent here.

## Conclusion

The question counsel hopes this Court will ask itself, vis-a-vis this issue is this:

> "Given the historical perspective of the particularity requirements of the Fourth Amendment and the language set forth in the affidavit and search warrant at issue herein, what before the fact guidelines would I have had, had I been one of the officers who executed the December 23, 1996 search warrant, to allow me to differentiate between the illegal versus legal items as regards any of the 11 types of property I was told I must seize?"

The answer to that question, counsel respectfully urges, is that no before-the-fact guidelines were provided, thereby vesting in the executing officers precisely the same sort of unbridled discretion to seize whichever documents they felt fell within the various generic descriptions of documents listed in the search warrant, and to seize whichever items of generically described non-record property described therein, i.e., whichever bale of hay, golf cart, shingle sample, etc., they decided, in their personal discretion, that they should seize. That type of discretion could have been eliminated, or vastly diminished had the language of the search warrant

been written with more particularity. For example, the warrant could have said that bales of hay held together by a unique loop are to be seized. It could have said that brown shingle samples (as had been reported stolen) were to be seized. It could have said records related to a specific type of car were to be seized. Instead, the warrant failed to particularize any of the 11 types of property the officers were directed to seize. We now know that as to some of those types of property, the executing officers did not seize anything (shingle samples, for example), and as to documents, they scooped up massive quantities of unread materials, in order to read them at a later time, to see if they contained anything of value related to any criminal charge then under investigation or as yet unknown. In short, the instant search warrant and affidavit, as written, gave the executing officers an "open ticket" to lack everywhere on the Defendant's premises for 11 types of generic and otherwise lawfully possessed materials. The officers "cashed in" upon that opportunity by rummaging through the Defendant's property, including Detective Perry's real target, the gun vault, until they found something that incriminated the Defendant.

Counsel respectfully asks this Court to rule that the language of the search warrant which described the property to be seized failed the particularity requirements of the Fourth Amendment, and, for that reason, that the search was unreasonable, so as to require the suppression of all of its

fruits, including the firearms and marijuana found in the Defendant's gun vault.

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**Issue 3**

**WAS THE EXECUTION OF THE DECEMBER 23, 1996 SEARCH DONE IN SUCH AN OVERLY BROAD FASHION AS TO REQUIRE THE SUPPRESSION OF THE EVIDENCE SEIZED FROM THE DEFENDANT'S HOME ON THAT DAY?**

This issue is closely related to Issue 1, in that because the language describing the property to be searched for and seized was so generally worded, the executing officers were not properly limited to what they should have been searching for, vis-a-vis what the facts in the affidavit allowed them to seize.[9] However, apart from the issues of whether the affidavit provided adequate probable cause to search anywhere within the Defendant's home, and whether the language describing the property to be searched for and seized, **as written**, met the Fourth Amendment's

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[9]Obviously, Defendant contends that the affidavit failed to provide any facts which justified the search of the Defendant's home, but that issue has already been addressed and resolved by this Court.

particularity requirements, the facts of this case also present an issue of whether the officers who executed the search warrant did so in a way which exceeded any arguable basis for the scope of that search, and, if so, whether the fashion in which the search was executed was so broad as to render the search of the Defendant's home totally unreasonable under the Fourth Amendment--simply because of how it was executed.

This was the issue upon which defense counsel attempted to develop a factual history on July 31, 1998, but was prevented from doing so when the Court held that:

> "... the search may very well -- certainly may be that the search was unauthorized and went too far as to some items, but not other items. But concerned with the -- with the search which discovered these firearms and resulted in the seizure of the firearms." (07/31/98 Tr, p. 154)

The background for that ruling was that Mr. Haviland had objected to a question put to Detective Perry about his authority for seizing police shins and badges on December 23, 1996 (07/31/98 Tr, p.153). When defense counsel indicated that he was trying to establish that the search was a textbook example of a general rambling search during which the officers who conducted it had no intention to pay attention to the limitations or strictures of the search

warrant (07/31/98 Tr, p.154), this Court sustained Mr. Haviland's objection as described above.

In Mr. Haviland's response to the Defendant's September 30, 1998 effort to try to make certain that this issue was preserved for appeal, he contended that the Defendant had not adequately presented it as to the firearms at issue, and that:

> "...even now, defendant does not allege what actions of the executing officers should be held to require suppression of the marijuana." (Government's 10/23/98 Response, p. 6)

The facts which the Defendant would have offered upon this issue cannot all be known at this point, because counsel was not permitted to question Detective Perry about this issue in this Court, and, based upon this Court's ruling, the other executing officers were not called in July. In addition, what Detective Perry and those other officers had to say about this issue in Judge Burress' court was not argued, and, in the case of some of those officers (Luzod, Moore and Westendorf), their state court transcripts were not provided to this Court. Nor were Judge Burress' findings upon this issue specifically argued, although this Court was provided with a copy of Judge Burress' Opinion and Order.

Some of the facts disclosed in the state court transcripts which bear upon this issue are as follows.

**(1) The December 23, 1996 search was, in part, a pretext for searching the Defendant's home and gun vault in order to provide ATF Agent Evans with information which Detective Perry felt might result in the Defendant being charged with federal firearms violation.**

Years before 1996, Detective Perry had been told by neighbors of Mr. Wolfe that they (the neighbors) had heard what sounded like automatic weapons fire from the Wolfe property (02/09/98 Tr, pp. 101-102). Per Detective Swackhammer, Perry mentioned these complaints during his early morning pre-search briefing on December 23, 1996, and had said that he expected to find some fully automatic weapons in the Wolfe gun vault (03/02/98 Tr, p. 107). Swackhammer also said that Detective Perry had told all of the officers present at the pre-search briefing that they should watch far automatic weapons, which had to have "special licensing" (03/02/98 Tr, p. 153). Several police officers had also told Detective Perry, before 1996, that Mr. Wolfe possessed a federal firearms license (02/09/98 Tr, p. 102). Detective Perry had spoken with ATE Special Agent Randy Evans about those reports of automatic weapons over the years before 1996 (02/09/98 Tr, p. 102). At that time, Detective Perry only knew that Mr. Wolfe had a federal firearms license, but did not know what type of federal

license he had, and he had no idea whether what was going on at the Wolfe residence was legal or illegal (02/09/98 Tr, p. 102).

Detective Perry testified that before he sought the December 23, 1996 search warrant, Mr. Harp, one of his informants in this matter, had told him that Mr. Wolfe maintained illegal firearms on his property. Detective Perry conceded that he had no idea whether those firearms were illegal or not (02/09/98 Tr, p.104). Perry also said that he had made no investigation of that allegation before December 19, 1996, nor did he include that assertion in his December 19, 1996 affidavit (02/09/98 Tr, pp.104-105). Per Detective Perry, both Mr. Harp and Mr. Van Patten had, prior to December 19, 1996, told Mr. Perry about the "secret" gun vault in Mr. Wolfe's basement (02/10/98 Tr, p. 124), and had said that it contained machine guns and silencers (02/02/98 Tr, p. 77). Obviously, the December 19, 1996 affidavit made no mention of that gun vault, or of Mr. Harp's and/or Mr. Van Patten's statements about its contents.

In December, 1996, before the December 23, 1996 search was conducted, Detective Perry told Agent Evans about the impending search of to Wolfe premises (02/09/98 Tr, p. 103). He said that he had contacted Agent Evans in advance of the December 23, 1996 search, because of the prior reports from Mr. Harp that firearms on the Wolfe premises were illegal (02/09/98 Tr, p. 104). He asked

Agent Evans if Mr. Wolfe could lawfully possess silencers and automatic weapons (02/09/98 Tr, p. 105). Although Agent Evans did not directly respond to that question, he (Evans) told Detective Perry to let him (Evans) know if he (Perry) saw those sorts of weapons on the Wolfe premises (02/09/98 Tr, p. 105). Agent Evans also told Detective Perry that if he (Perry) had any questions about the "items" Perry found in the Wolfe search, that he (Perry) should contact Mr. Evans (02/09/98 Tr, p. 105). Agent Evans also told Detective Perry that although he (Evans) could not be present forte search of the Wolfe residence, that if Perry saw anything "funny" during the search, or if Perry needed any help in that search, to let him (Evans) know (02/10/98 Tr, pp. 116-117).

Detective Perry testified that even though he knew that the December 23, 1996 search warrant did not authorize him to search for any firearms on the Wolfe premises (02/09/98 Tr, pp. 84-86), he in fact intended to look for firearms during the search, including the firearms within Mr. Wolfe's gun vault (02/09/98 Tr, pp. 106-107). Detective Perry testified that he intended to make a note of all of the weapons within the gun vault, and provide that information to Agent Evans. He (Perry) assumed that Agent Evans would know what action, if any, would be taken, based upon that information (02/09/98 Tr, p. 106). After Detective Perry had spent whatever period of time it took to arrest the Defendant when he (Perry) first entered

the Wolfe home on December 23, 1996, he began his search in the basement of the Wolfe home, looking fir the "hidden roam" (the gun vault) (03/17/98 Tr, pp. 70-71).

After Detective Perry had forced entry of the bookshelves covering the door to the gun vault, and after he had obtained the combination to the door to the gun vault by telephone from Mr. Wolfe, he entered the gun vault and saw the marijuana plants. He immediately recognized that he was confronted with a brand new legal issue, i.e., what to do about that discovery (02/10/98 Tr, p. 68). He concluded that finding the marijuana "changed everything," vis-a-vis his search plan (02/10/98 Tr, p. 68).

Detective Perry acknowledged that at the time he opened the gun vault, he knew that the contents of the gun vault would not be removed or in any fashion compromised if he decided to seek a second search warrant, based upon what he saw when he entered the gun vault (02/09/98 Tr, p.68). He decided to call Mr. Garber for advice. When he did, he asked Mr. Garber whether he should obtain another search warrant because of what he had found in the gun vault (02/09/98 Tr, p.87). He was told that because the marijuana and guns were there, he could seize "both of those" without another search warrant (02/09/98 Tr, p.87). That advice was eventually interpreted to justify the seizure of all firearms and weapons of any sort which were found

anywhere upon the Wolfe premises, including areas other than in the gun vault (03/17/98 Tr, p.57).[10]

Counsel cannot find any Supreme Court authority which directly addresses the issue of a "pretext" search. In *Horton v California*, 496 US 128, 110 L Ed 2d 112, 1195 Ct 2301 (1990), the Supreme Court rejected the requirement that an object be found inadvertently to qualify as an object found in "plain view," by noting:

> "The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure **if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement.**" *Id.* 138

> In Justice Brennan's dissent, he noted that:
> "[T]he Court is not confronted today with what lower courts have described as a 'pretexual' search.... For example, if an officer enters a house pursuant to a warrant to search for evidence of one crime when he is really interested only in seizing evidence relating to another crime, for which he does not have a warrant, his search is 'pretexual' and the fruits of that search should be suppressed." *Id.* p.147

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[10]Please see Appendix 1, which is a copy of an exhibit received in the state court motion to suppress, which exhibit including a list of all items seized from the Wolfe premises on December 23, 1996.

The Defendant has already made his contentions upon the issue of whether Detective Perry's seizures of the firearms at issue in this case was valid under the "plain view" doctrine, and this Court has made its findings upon that issue. However, whether Detective Perry's entry into the gun vault was based upon his pre-existing intent to search for and note the characteristics of the firearms he found in the gun vault, and, if so, what impact that intent has upon the issue of whether he could or should be allowed to avail himself of the "plain view" doctrine, or, mare importantly, whether the Government should be able to offer the fruits of that search in evidence, has not yet been decided. The Defendant herein respectfully contends that in addition to the affidavit providing no facts upon which to authorize a search of the Defendant's home/gun vault, and in addition to it not being immediately apparent to Detective Perry that any of the firearms at issue were criminally possessed, together with the fact that his real reason for entering the gun vault was not to look for stolen lumber, stolen golf carts, etc., and the fact that he had no reason to look in the gun vault for any of the records described in the search warrant, all compel a conclusion that Detective Perry's search of the gun vault was a pretexual search for illegally possessed firearms. In plain English, Detective Perry entered the gun vault to search for and record information about firearms under the authority of a search warrant which did not authorize him to look for or

seize such information. Therefore, that entry was illegally made, because it was made under the pretext of searching for something (**illegally** possessed firearms) which he had no probable cause or reasonable basis to believe was there. He said as much when he described his reaction to Mr. Harp's description/conclusion of what was in the vault.

**(2) The search was not conducted in a fashion that was as limited as possible to find that which was purportedly being sought.**

As previously argued, it is the Defendant's contention that searches must be as limited in scope as the facts offered in support of a search warrant permit, i.e.:

> "The manifest purpose of the particularity requirement [of the Fourth Amendment] was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be **carefully tailored to its justifications**, and will not take on the character of the **wide-ranging exploratory searches the framers intended to prohibit**. Thus, the scope of a lawful search is defined by the object of the search and **places in which there is probable cause to believe that it may be found**. Just as probable cause to believe that a stolen lawn mower may be found in a garage will not support a warrant

> to search an upstairs bedroom, probable cause to believe undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase."

*Maryland v Garrison,* 480 US 79, 84-85, 94 L Ed 2d 72, 107 S Ct 1013 (1987) [quoting from *United States v Ross,* 456 US 798, 824, 72 L Ed 2d 572, 102 S Ct 2157 (1982)] (emphasis added)

At the very most, the December 19, 1996 affidavit suggested that specific stolen building materials may have been used to erect a pole barn on the Defendant's premises, several months before,[11] that stolen hay bound by a unique loop in the twine which held it together had been stored in an abandoned airplane hangar several months before December, 1996, and that a golf cart bearing a specific vehicle identification number had been transported to the Defendant's property about two (2) years ago. The officers who conducted the December 23, 1996 search flagrantly exceeded even the mast expansive interpretation

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[11]This conclusion, of course, does not constitute any sort of concession or admission that the language of the affidavit justified the entry upon the Wolfe premises to look for these items, given the issue of whether the affidavit was sworn to, the false statements within the affidavit, the staleness of this information, the general language of the warrant, etc.

which can be ascribed to the scope of the search as authorized by the December 19, 1996 affidavit.

Five (5) detectives participated in the actual search of the premises, i.e., Detective Perry, Detective Moore and Detective Luzod from the Livingston County Sheriff Department, Detective Swackhammer of the Michigan State Police, and Detective Westendorf of the City of Brighton.[12] Luzod, Swackhammer and Westendorf had not read the search warrant prior to or during the search (03/17/98 Tr, p.80 [Luzod]; 02/23/98 Tr, pp.112-113 [Westendorf; 03/02/98 Tr, pp.92, 95 [Swackhammer]). Detective Moore's principal job was to take photographs of the areas being searched, and of some of the items being seized (03/02/98 Tr, pp.6-7). Detective Perry gave him either a copy of the search warrant or affidavit before he (Moore) got to the premises (03/02/98 Tr, pp.5-6). Moore did not consider himself to be apart of the search team *"per se"* (03/02/98 Tr, p.6). None of the 182 items listed as having been seized from the Wolfe residence on

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[12]A Michigan Department of Natural Resources officer was said to have been present during the search, but no one has ever been able to identify who that person was or what he/she did (03/02/98 Tr, p 38).

December 23, 1996 Appendix #1) were noted as having been seized or found by Detective Moore.[13]

Detective Westendorf was told, before he got to the Wolfe residence, that they were to be searching for records and stolen property (02/23/98 Tr, p.117). He could not recall what sort of records they were to be searching for (02/23/98 Tr, p.117). He said that he was not to seize anything without being directed to do so by the Sheriff's Department (02/23/98 Tr, p.118). He said that the only property he handled were the contents of the vault as they were being carried from the vault (02/23/98 Tr, p.119). He tried to find containers for the guns as Detective Perry handed them to him, as he removed them from the vault (02/23/98 Tr, pp.138-139, 145). He said that Detective Perry dictated serial numbers of firearms as they were being removed from the vault (02/23/98 Tr, p.139). He also said that he was not told what to search for in the Wolfe home, and, in fact, did not recall searching for anything there (02/23/98 Tr, p.142). Appendix 1, Item 136, does suggest that Detective Westendorf searched one of the Wolfe bedrooms, and seized/found a box of miscellaneous paper records and otherwise unidentified cassette tapes.

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[13]In fact, some of the items listed on that exhibit did not describe who seized them, and, to date, no one has provided counsel with any sort of document which purports to establish the chain of custody of any of the objects seized from Mr. Wolfe's home on December 23, 1996.

Detective Luzod testified that early in the search, he saw weapons located in "plain view" while he was in the upper floors of the Wolfe home (03/17/98 Tr, pp.55-56). He left them there for a few hours into the search, i.e., until after Detective Perry had contacted someone in the Prosecutor's Office. Perry then told Luzod to seize all of the guns found anywhere in the residence (03/17/98 Tr, p.57). Before Luzod seized any of the weapons from areas other than the vault, he said that he simply "... looked around and spotted firearms" (03/11/98 Tr, p.58). Detective Perry did not tell Detective Luzod that there were any specific records in the Wolfe home which had a specific relationship to a specific crime, i.e., all Luzod was told (before the search began), was that they were looking for

stolen property, hay and construction tools or supplies[14] (03/17/98 Tr, pp.79-80).

Detective Luzod described a portion of his search efforts as follows:

> "I didn't know what I was lookin' for until I got in the room. If I saw something that I would be able to connect to one of the cases that he had in mind."

At that point, Mr. Luzod was asked about what cues "he" had in mind. His response was:

> "Records to prove, you know, if he [Wolfe] had bought things that some of the informants had said

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[14]Detective Moore described a practice which was employed at the Wolfe home on December 23, 1996, whereby when the Livingston County Sheriff Department officers were authorized to look for any specific stolen materials, they should also look for any other materials which were in "plain view" and could be identified by a serial number. When such items were found, the officer was to call aback to his office to see the serial numbers appeared upon any list of stolen property (03/02/98 Tr, pp 50). Detective Swackhammer employed that practice while inspecting two (2) golf carts on the Wolfe premises, except that he called the manufacturer to see if the manufacturer could help him identify one or both of the carts as stolen (03/02/98 Tr, p 140). (See also, items 148 and 149 of Appendix; and 03/06/98 Tr, pp 23-25.)

> that he stole this and that, maybe there would be some records there that would conflict with our informants testimony." (03/17/98 Tr, p. 78)

Detective Luzod also said that since he was searching for papers or documents, he felt he could search for them anywhere.[15]

Detective Swackhammer, at one point, said that no one went out on their own in searching specific areas, i.e., that Detective Perry was primarily directing tern (03/02/98 Tr, p.118). He described, for example, that when he (Swackhammer) found a box in a closet on the main floor of the home which contained receipts or records and photographs, he showed it to Detective Perry so that he (Perry) could determine whether or not it contained items he (Perry) needed or wanted (03/02/98 Tr, pp.117-118). All Swackhammer knew, when he searched the closet, was that he was looking for records concerning building materials for the house and the pole barns (03/02/98 Tr, p. 119). When he saw a few records or receipts in the box which had "something to do with building materials," he

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[15]Thus, per Detective Luzod's testimony, he walked around from room to room, looking for documents or papers which might tend to contradict information provided to Detective Perry by his (Perry's) informants, vis-a-vis things the informants had said Mr. Wolfe had stolen.

took the entire box of records and photographs to Perry, i.e.:

> "I took the whole box rather than looking through it not knowing exactly what was needed to be seized, 'cuz that was Det. Perry's -- this was Det. Perry's investigation." (03/02/98 Tr, p.120)

When challenged that what was going on during the search was that anything which looked like it might be useful was simply seized and sorted out later, Detective Swackhammer denied that this was the approach. He offered an example of how he exercised his own discretion in conducting the search by describing an instance of photographs of persons (other than Mr. Wolfe) firing automatic weapons being looked at and not seized (03/02/98 Tr, pp.121-122).[16]

Detective Swackhammer, in explaining why he had asked Mrs. Wolfe for permission to search the interior of the three (3) vehicles parked on the Wolfe premises on December 23, 1996, said, at one point in his testimony, that when he peered through the windows of two (2) of those vehicles, he was not looking for anything in particular, i.e., that he was looking for:

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[16]Thus, Judge Hegarty's "order" (in the form of a search warrant) directing the executing officers to seize "photographs" was not carried out in this instance, because of an exercise of discretion by one of the executing officers.

"Anything that shouldn't be there or that we would need in our investigations."
(03/02/98 Tr, p.126)

As noted above, he had not read the search warrant, and, more specifically, he had not looked at the search warrant to see if it authorized him to search the vehicles (03/02/98 Tr, p. 124).[17]

Swackhammer also said that he took weapons from shelves in the gun vault, and read their serial numbers to whoever of the four or five guys who were removing guns and tabulating their numbers as he did so (03/02/98 Tr, pp.148-149). Later he said that as the guns from the vault were being seized, a description of them was being put into the report, and a description was being written on a bag or something in which the guns were being temporarily stored (03/06/98 Tr, p.13)[18] He also testified that no guns were

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[17]Swackhammer testified that a reason he looked into the vehicles was because of a threat he said he heard Mr. Wolfe made against Mr. Perry earlier that morning (03/02/98 Tr, pp 126, 173). He made no mention of that threat in his report, nor did he describe his having sought or obtaining Mrs. Wolfe's consent to search those vehicles in his December 23, 1996 write-up (03/02/98 Tr, p 131 and DX 15 of State Motion).

[18]The chain of evidence, vis-a-vis how the firearms seized from the vault were handled is in hopeless conflict, when Perry's, Swackhammer's, Moore's and Luzod's

seized from the vault until a thorough search of the vault and home was conducted to see if any documents describing the necessary registration for those weapons had been completed (03/02/98 Tr, p.152). He said that:

> "All of the officers that were present and searched the home kind of brought the paperwork to Detective Perry for his -- his review. So I'd have to say that anything that was found was reviewed by Detective Perry." (03/02/98 Tr, p.152)[19]

Detective Swackhammer was also questioned about a quantity of money which Mrs. Wolfe has alleged was stolen by someone during the December 23, 1996 search.

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testimony is compared.

[19]Detective Swackhammer appeared to be talking about gun registration "paperwork" here (03/02/98 Tr, p 154). If so, then clearly it was **not** immediately apparent to Detective Perry that the firearms seized from the gun vault were illegally possessed, since per Detective Swackhammer's testimony, Perry did not make the decision to seize those firearms until **after** a search of the vault and the entire Wolfe residence had failed to yield whatever "paperwork" Perry felt had to be present therein for those weapons to be lawfully possessed. Detective Perry also said, on two (2) occasions, that his inability to find sufficient "paperwork," vis-a-vis the guns seized from the vault, was one of his reasons for seizing those guns (02/09/98 Tr, p 94; 02/10/98 Tr, pp 52-53). This testimony, of course, also bears upon the "immediately apparent" prong of the plain view issue.

He said that at one point when she wanted to go to the kitchen during the search, he went with her, and that for safety **and evidence** reasons (03/02/98 Tr, p.164), he opened all drawers in the kitchen as Mrs. Wolfe moved near them (03/02/98 Tr, p.165). One of the drawers had a "wad" of bills in it, and Detective Swackhammer looked at what was around them, which appeared to be nothing:

> "... that was in any way of interest or related to what we were searching for." (03/02/98 Tr, p.166)

He agreed that at that point, he was searching for anything that he could find which might be evidence of a crime (03/02/98 Tr, p.167). Detective Swackhammer also found tapes of what he recalled appeared to be of telephone calls in the Wolfe kitchen (Appendix 1, Item 180). He brought them to Detective Perry's attention (03/06/98 Tr, p.12). Swackhammer did not know if Detective Perry listened to them, or why they were seized (03/06/98 Tr, p.12). He (Swackhammer) had not listened to them and did not know if they were covered by the search warrant (03/06/98 Tr, pp.12-13).

Detective Perry, during the state motion to quash, when asked to explain upon what authority he had demanded and obtained entry into the locked gun vault, stated that the "entire premises" language of the warrant, together with its directive to search for various records and receipts, permitted him to search every building and every

room on the premises, and, further, that those directives permitted him to open every "container" upon the entire premises, so long as that "container" was not so small that it could not reasonably hold a single receipt (02/10/98 Tr, pp.29-30). He added that he believed it would have been negligent for him to have conducted the search in any other fashion (02/10/98 Tr, p.29). Detective Perry acknowledged that during the search, he had seized items which, at the time he seized them, he had no idea whether they were related to any criminal act (02/11/98 Tr, p.174). He also acknowledged that he had seized items during the search (police badges and police shirts from police departments for which Mr. Wolfe had formerly worked) because he (Perry) was fearful that Mr. Wolfe might use tern to commit fixture criminal acts (02/10/98 Tr, pp.80-83). He agreed that this prevention of future crime component of the December 23, 1996 search was his own idea as opposed to anything he had been trained to do (02/11/98 Tr, p. 178).

Detective Perry could not offer any explanation for other items (a can of "defensive gas" and a business card of the Defendant) seized during the December 23, 1996 search (02/10/98 Tr, p.91). He seized empty boxes of ammunition to provide "farther proof" that firearms had been found on the premises (02/10/98 Tr, p.94). He seized a small audio cassette which had an inscription on it, i.e., "I love you." When asked under what authority he had seized that object, his explanation was that the search warrant authorized him

to seize "records," and because he did not know what was on the tape when he found it, he needed to learn what was on it--regardless of whether or not it helped prove that a crime had occurred (02/10/98 Tr, p.94). He listened to the tape sometime after the search, determined that it contained nothing of value to the investigation, but, as of February, 1998, the tape had still not been returned to the Wolfes (02/11/98 Tr, p.180).

Detective Perry, both in this Court,[20] and during the state court motion, said that no one had ever told him before December 23, 1996 that any receipts related to stolen property had ever been in the Wolfe residence (02/10/98 Tr, p.21). Detective Perry agreed that despite the fact that no one had told him that any receipts relating to stolen property was ever in the Wolfe residence, and despite the fact that no one had ever told him that any stolen property was within the Wolfe residence, and although he did not

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[20]In his federal court testimony, Detective Perry was equivocal about whether Mr. Van Patten may have told him something about **veterinary bills** being in the home, but beyond that possibility, he agreed that no one had told him, in advance of December 19, 1998, that any of the 11 types of property the search warrant authorized him to search for and seize had ever been located within the Wolfe home (07/31/98 Tr, pp 13-14). Thus, it would have been reasonable to conclude that none were in the Wolfe home on December 23, 1996.

have a strong belief that there would be records of stolen property in the home, he:

> "... had a common procedure that would direct me to the home to search for receipts of any kind for these materials.
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> * * *
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> As is commonly done in search warrants, those documents that might either prove or disprove whether or not those items are stolen might be found in--" (07/3 1198 Tr, pp.15-16)[21]

During his state court testimony, Detective Perry said that his only basis for believing that any receipts related to stolen property might be in the Wolfe home on December 23, 1996 was his own personal belief that such records might be there (02/10/98 Tr, p.23). He also noted on this issue:

> "I would assume that there would have to be receipts somewhere if--or paper trail on some of these items." (02/10/98 Tr, p.22)

Thus, although the affidavit contains no allegation that any of the 11 types of property the search warrant authorized

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[21]At that point, Mr. Haviland interrupted Detective Perry's answered by objecting that it was "non-responsive" (07/31/98 Tr, p 16).

Detective Perry to search the Wolfe's "entire premises," including their home, had ever been inside the Wolfe home, and although Detective Perry acknowledged that no one had ever told him that any of those 11 types of property had ever been inside the Wolfe home, he nevertheless searched the entire Wolfe residence for all 11 of those types of property, including all containers of any size therein, simply because of his personal belief that such evidence might be there, and because of some sort of "common procedure" that he adopted, vis-a-vis the execution of search warrants.

Detective Perry acknowledged that his informant, Mr. Van Patten, had not told him that any of the hay stolen in August, 1996, was still on the Wolfe property (02/10/98 Tr, p.131). He also acknowledged that without seeing a unique "funny" loop in the twine which held the stolen bales of hay together, there was no way anyone could identify any bale of hay found on the Wolfe property as stolen (02/10/98 Tr, p.134). Yet, despite these facts, Detective Perry directed that every bale of hay found on the Wolfe premises on December 23, 1996 be seized, and returned to the hay theft complainant before the commencement of any trial involving the August, 1996 theft of hay from that person (02/11/98 Tr, p.147; 02/11/98 Tr, p.29).

As regards the 51 sheets of OSB board which Detective Perry ordered seized from the Wolfe premises on December 23, 1996, he testified that he identified those

sheets as stolen based upon information supplied to him by Mr. Van Patten to the effect that not all of the OSB board stolen in September had been used to construct a pole barn on the Wolfe premises (02/10/98 Tr, p.135). Perry agreed that he had not included that statement in the affidavit, nor had he noted it in his write-up of Mr. Van Patten's pre-search statement(s) (02/10/98 Tr, pp.135-136). He also agreed that although he believed the OSB board seized had orange paint on it, that was not particularly unique to the stolen OSB board, and no indication to the effect that the stolen OSB board had orange paint on it Bad been included in the affidavit (02/10/98 Tr, p.137). Again the "stolen" OSB board was returned to the building material complainant in advance of the September, 1997 trial relating to it[22] (02/11/98 Tr, p.147).

When Detective Perry was questioned about his authority to search the Wolfe residence for records relating to golf carts,[23] Detective Perry again agreed that he had received no "pre-search" information that any golf cart or any records relating to a golf cart were in the Wolfe home. Initially, he justified his having searched for such records

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[22]Judge Burress directed a verdict in Mr. Wolfe's favor at that trial.

[23]Which like the hay and OSB board were returned to the theft complainant before any trial relating to their theft (02/11/98 Tr, p 29).

by stating, "That's what we were searching for" (02/11/98 Tr, p.30). He then sought to justify his search of the Wolfe residence for records of ownership of golf carts under that portion of the search warrant which authorized him to search for registration of vehicles (02/11/98 Tr, p.34). When he was forced to admit that he did not know of any requirement that people must register their ownership of golf carts as vehicles, he then said that people "usually" retain records and/or receipts which establish that they owned club (golf) carts because such carts are expensive. He then admitted that he knows no one who owns such a cart (02/11/98 Tr, p.35).

As regards the stolen horses allegation, Detective Perry testified that even though his affidavit had affirmatively alleged that the horses stolen in May, 1996 were no longer on the Wolfe premises, he (Perry) nevertheless searched for them when he entered upon the Wolfe property on December 23, 1996 (02/11/98 Tr, p.40).

Detective Perry testified that he had no pre-search information that any weapon allegedly used by Mr. Wolfe to commit any crime described in the affidavit was within the gun vault, or anywhere else on the Wolfe premises on December 23, 1996 (02/11/98 Tr, pp.190, 198). Nor did Detective Perry associate (or find) any of the weapons seized from the vault "with" the marijuana he discovered in the vault (02/10/98 Tr, pp.122-123). Ultimately, he said that his reason for seizing all of those weapons was the

telephone directive he received from Assistant Prosecutor Garber to seize all weapons in the entire house, because of the discovery of marijuana in the gun vault (02/09/98 Tr, pp.87-90 and 02/10/98 Tr, pp.52, 69-70, 77).

Detective Perry did not create a return in which he listed all of the materials seized from the Wolfe premises on December 23, 1996. He testified that the purpose for creating such a return was to give the court which authorized the search "an idea" of what items had been seized pursuant to the search warrant (02/11/98 Tr, p.145). He also testified that neither the Prosecutor nor any court had authorized him to turn over the firearms he had seized from the Wolfe gun vault to the ATF. He did so simply because he was requested to do so by the ATF agent (02/11/98 Tr, pp.150-151).

Assistant Prosecutor Garber, the author of the affidavit, and the person who took credit for the language of the first two (2) paragraphs of the search warrant (02/23/98 Tr, pp.76-77), testified that he felt there was an adequate basis within the affidavit for searching the Wolfe home for insurance contracts because it was "common knowledge" that such records were typically kept at a residence or in close proximity to where the crime is committed (02/23/98 Tr, pp.29-30).

Even though the only place the affidavit had alleged that stolen hay was ever situated on the Wolfe premises was the airplane hangar, Mr. Garber said that Detective Perry

was entitled to search Mr. Wolfe's entire premises for the stolen hay, **including his house** (02/23/98 Tr, p.32). Even when Mr. Garber's own language, as set forth in the affidavit, wherein it was indicated that but one (1) stolen golf cart had ever been on the Wolfe premises (in early 1995) was pointed out to him, Mr. Garber indicated that he felt it was appropriate for the officers to seize two (2) golf carts from be Wolfe premises on December 23, 1996, as they did, because another officer (Detective Swackhammer) had said he had seen more than one golf cart on the Wolfe premises, during an unidentified prior visit, and because "common sense" dictated that if one golf cart was stolen, it was therefore "pretty likely" that the second cart was also stolen (02/23/98 Tr, pp.33-34). Contending that the officers should have limited their search for and seizure of "golf cans" to the cart described in the affidavit as stolen was characterized by Mr. Garber as "splitting hairs" (02/23/98 Tr, p.34)[24]

When asked about where on the premises he felt the officers were entitled to search for "shingle samples," Mr. Garber said that because the warrant was directed to the "entire premises" (23/23/98 Tr, p.38), the officers were free

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[24]Mr Garber also characterized a challenge to language within the affidavit wherein Detective Perry was alleged to have "personally verified" a fact, when, in truth, he had been told of that "fact" by another as splitting hairs (02/23/98 Tr, pp 21-22).

to search for shingle samples inside the Wolfe house, including inside his gun vault (02/23/98 Tr, p.37).

When asked about the existence of any limitations upon the officers in terms of searching for and seizing "photographs" pursuant to the search warrant, Mr. Garber's response was that because Mr. Van Patten had provided the officers with a photograph of a golf cart upon the Wolfe premises (which was not known to be a stolen cart) and because it was "... a common thing that people maintain photographs of illegal activities," he (Garber) felt that the "photographs" language of the search warrant entitled the officers to seize "any photograph, ... demonstrating incriminating evidence" (02/23/98 Tr, pp.39-41). He characterized a question concerning the propriety of searching for and seizing "photographs" from the Wolfe premises without having made any assertion in the affidavit that any photographs of illegal activities were on the premises as an effort to mislead the court by "nitpicking" the affidavit rather than reading it as a whole (02/23/98 Tr, p.80).

Mr. Garber also testified that even though he had, apparently by oversight, not asked for permission to search the entire Wolfe premises for firearms, his having asked for and received permission to search for and seize **records** relating to the purchase, ownership and registration of firearms, arguably authorized the search for and seizure of firearms, since to him a firearm is "physical evidence" of

the purchase or ownership of a firearm (02/23/98 Tr, p.42). Mr. Garber also defended the language of the search warrant which authorized the seizure of (any) records or evidence relating to horse ownership, sales or veterinary treatment from anywhere on the Wolfe premises by a personal application of his own common sense, i.e., he said that because there were barns and horses there, it was common sense that there would also be such records there (02/23/98 Tr, pp.53-54).

In general, Mr. Gaiter's view of the authority of a police officer executing a search warrant was that the officers did not need additional permission to seize things not covered by the search warrant, i.e., such seizures were a "... matter of the officers' discretion in the field" (02/23/98 Tr, p.94).

As regards specific items seized by Detective Perry, such as cassette tapes, Mr. Garber's response was that it was appropriate to seize them:

> "If they had some indicia of criminality on his part. And I guess we wouldn't know that until we examined 'em." (02/23/98 Tr, p.96)

Mr. Garber denied that he had ever instructed police officers, in executing a search warrant, that when they had any doubt about items, they should seize everything that might be usable as evidence, and sort it out later (02/23/98 Tr, pp.101-102). Detective Perry, both during the

September, 1997 trial of the State's building materials case involving Mr. Wolfe, and during the hearing upon the notion to quash, testified that he adopted that practice, vis-a-vis the 2,000 or so pages of documents he seized during the December 23, 1996 search at the Wolfe home (see Exhibit 7 of the Motion to Quash; 09/16/97 Tr, p.68; and 02/09/98 Tr, p.49)[25]

In terms of what was seized from the "entire" Wolfe premises on December 23,1996, the breakdown as per Appendix 1 is as follows:

(1) Total items seized by reference to a separate number: 182

(2) Items seized from the Defendant upon his arrest (items 116-119): 4

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[25]Originally, Detective Perry testified that he had "pretty much" looked at every sheet of paper he had seized from the Wolfe home on December 23, 1996 (02/09/98 Tr, pp 45-46), and that the officers he directed during that search had also read the documents as they had seized them (02/09/98 Tr, p 47). Later, he admitted that he had no idea whether the officers who assisted him in executing the search warrant had read the documents they seized, at the times they were seized (02/09/98 Tr, p 48).

(3) Items seized from the Defendant's gun vault (items 4-114 and 169): 112[26]

(4) Items seized from inside the Wolfe residence, other than from the gun vault (items 120, 122-126, 165, 171-174 [master bedroom]; items 127-129 [den]; items 130-133, 160 [living room]; item 134 [dining room]; items 136-137, 182 [lower level bedroom]; items 138-145 ["mid" room]; item 146 [pantry]; and item 180 [kitchen]): 37

(5) Items seized from locations outside of the Wolfe home (items 2, 115 [horse barn]; items 148-149, 179 [S/B storage barn]; items 150-152 [Mrs. Wolfe's Jeep]; item 153 [pick-up truck]; items 154-159, 161-162, 166-170, 183 [Dynasty vehicle]; and items 2, 181 [airplane hangar]): 24

(6) Items for which no location is described (items 121, 135, 147, 163 and 164):5

To date, none of the firearms seized from the Wolfe premises on December 23, 1996 have been returned to him

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[26]As closely as can be determined from Appendix 1, these 112 items consisted of 97 firearms, 9 firearms parts, 3 ammunition containers, police badges, a series of receipts and firearms transfer applications and the marijuana objects.

and/or his wife, and no state or federal forfeiture complaint has ever been filed against any of the objects seized from the Wolfe premises on that or any other day.

Very simply put, it is the Defendant's position upon this issue that the manner in which the instant search was conducted, particularly as regards Detective Perry, was so flagrantly beyond what the facts set forth in the affidavit justified, including its aspects of a pretexual search for illegal firearms, that all of the fruits of the search, including the firearms and marijuana found within the locked gun vault should be suppressed.

In *United States v Medlin,* 842 F2d 119 (10th Cir, 1988), an otherwise valid search warrant for illegal firearms resulted in a search for and seizure of numerous non-firearm items which one of the officers who conducted the search believed were present upon the Defendant's property prior to the search. Neither the affidavit nor the search warrant made any mention of these items, as is true in this case of both illegal firearms and/or marijuana. In *Medlin,* none of the items which were seized even though they were not mentioned in the affidavit or search warrant were to be used as evidence against the Defendant in the firearms violation case which the government had brought against Medlin. *Medlin's* original challenge to the seizure of the firearms, based upon a claim that the search warrant was defective, was denied. However, the Court of Appeals noted that because of the way the search warrant **was**

**executed** as opposed to its validity, as written, the search may have seen unreasonable--so as to require the suppression of all the evidence seized. *Id,* p.1196. Upon remand, the district court was asked to determine whether the manner in which the search itself was executed was so flagrant that exclusion of **all** of the evidence seized was warranted. The district court:

> "... found that the warrant issued to the ATF agents in the instant case was executed with flagrant disregard for its terms and suppressed all of the evidence seized including the firearms which were particularly named in the warrant." *Id,* p.1199

The circuit court noted that:

> "The basis for those decisions which hold that blanket exclusion is appropriate when a search warrant is executed with 'flagrant disregard' for its terms is found in our traditional repugnance to 'general searches' which were conducted in the colonies pursuant to the writs of assistance."

*Marron v United States* familiar language requiring that warrants must particularly describe the things to be seized with enough particularity to leave nothing to the discretion of the officer executing the warrant (Id, p.1199) was followed by this ruling:

> "When law enforcement officers grossly exceed the scope of a search warrant in seizing property, the

> particularity requirement is undermined and a valid warrant is transformed into a general warrant **thereby requiring suppression of all evidence seized under that warrant**." *Id,* p.1199

Obviously, Defendant does **not** concede that the search warrant in this case was a valid basis for seizing anything upon the Wolfe premises, especially from within their home (as per issue 1 above). Given the overbreadth of the warrant in this case, it was difficult for the executing officers to grossly exceed the "scope" of that warrant, but they managed to do so, as evidenced by their seizure of several items for which there is simply no reasonable justification, i.e., items to prevent future, as yet, uncharged crimes, items to rebut, as yet, unknown defenses, items for which even an after-the-fact justification could not be offered, cassettes simply to find out what was on them, records/receipts not looked at before they were seized, and records to see if their informants had been truthful, etc. In short, the officers in the case:

> "Armed with [a] warrant already drawn in the broadest manner, the agents exceeded even that authority." *United States v Fuccillo,* 808 F2d 173, 177 (1st Cir, 1987)

In *Medlin,* the government argued that the property which was seized outside of the scope of the (valid) warrant was not going to be offered against the defendant therefore

the improper manner by which such property was seized should not require the suppression of property lawfully seized, i.e., the firearms properly described in the search warrant. The court disagreed. i.e.:

> "The nature of a Fourth Amendment right is not so limited. An individual's right to be secure in his or her person and effects is guaranteed by the Fourth Amendment whether or not the fruits of a constitutionally invalid search have evidentiary value in a resulting criminal investigation."
> *Id,* p.1198[27] *See also, United States v Rettig,* 589 F2d 418, 423 (9th Cir, 1979 (wherein an otherwise valid search for marijuana was deemed unconstitutionally unreasonable because it was used as a pretext to search for materials the executing officers had known about beforehand, but had not included in the affidavit, and had seized while executing the valid warrant).

Counsel recognizes that in cases where the executing officers, acting pursuant to an otherwise particularized, valid search warrant, seize items beyond its scope, but do not flagrantly exceed the legitimate scope of a legitimate

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[27]*Medlin* also held that the *United States v Leon* good faith exception to the exclusionary rule was not available here because by definition when officers flagrantly exceed the scope of a valid warrant they cannot be said to have acted in an objectively reasonable fashion in executing the search, as required by *Leon. Id,* pp 1199-1200.

warrant, the appropriate remedy is to suppress only the items which were seized in violation of the scope of the warrant. *United States v Heldt,* 668 F2d 1238,1259 (DC Cir, 1981); *United States v Borromeo,* 954 F2d 245, 246(4th Cir, 1992); and *United States v Christine,* 681 F2d 749, 754-759 (3rd Cir, 1982). *See also, Aday v Superior Court of Alameda County,* 362 P2d 47, 51-52 (1961), which condemned that portion of a warrant which had listed broad, general categories of items to be seized which were "... ordinarily innocuous and are not necessarily connected with a crime ... [and] ... when taken together, were so sweeping as to include virtually all personal business property on the premises and placed no meaningful restriction on the things to be seized." *Id,* p.51.

In *Heldt,* the "line" between when all or only a part of the fruits of a search are to be suppressed was described as follows:

> "If in this case, law enforcement officers had conducted a document search as if no limiting warrant existed, rummaging at will among defendant's offices and files, then the mere existence of a valid--but practically irrelevant--warrant for certain specified documents would not be determinative of whether the search was so unreasonable as to require suppression of everything seized." *Id,* p.1259

## Conclusion

Detective Perry and his assistants, in conducting the December 23, 1996 search, recognized no limitation upon what they could search for, and recognized no reasonable limitations upon where on the Defendant's "entire premises" they could look for items which were described with insufficient particularity in the affidavit to provide them with any meaningful guidance in terms of what they were to seize and what they were not to seize. The search of the Defendant's gun vault was initially conducted in order to look for firearms, which Detective Perry knew the warrant did not authorize him to search for or seize. Why else was the gun vault the first place Detective Perry focused upon, and why else did he speak with Agent Evans about the impending search, before the affidavit was prepared, and why else would he have asked Agent Evans, before the search, whether the Defendant could lawfully possess automatic weapons and/or silencers, which he (Perry) had been told by Mr. Harp were present in the gun vault? Perry clearly had no basis for believing that any of the stolen property described in the affidavit (hay, golf carts, building materials, etc.) were in the Defendant's home or gun vault, nor did he have any information that any of the types of records described in the search warrant were there-other than perhaps his own "common sense"--which, of course, is

not a sufficient basis for entering a man's home wit or without a search warrant.

Even if this Court were to find that the affidavit and search warrant authorized the officers to search for and seize hay from the airplane hangar or building materials from the pole barn, as Judge Burress found, the items the Government intends to offer as evidence in this case, i.e., firearms and marijuana, were not described in the search warrant and were found as a direct result of the executing officers' flagrant disregard of even the overly broad provisions of the search warrant itself.

For these reasons, Defendant respectfully asks that this Court conclude that the manner in which the December 23, 1996 search was conducted grossly exceeded the scope of any authority provided to them by the December 23, 1996 search warrant, and because of that finding, enter an order suppressing the use of the firearms and marijuana as evidence in this case.

## Issue 4

**DID DETECTIVE PERRY'S EXTRACTION OF THE COMBINATION TO THE DOOR TO THE GUN VAULT VIOLATE THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL, AND, IF SO, DOES THAT VIOLATION REQUIRE THE SUPPRESSION OF THE FRUITS OF THE SEARCH OF THE GUN VAULT?**

The Government apparently does not contest the underlying facts of how Detective Perry obtained the combination to the Defendant's gun vault from the Defendant on December 23, 1996. Those facts are that after breaking open or dismantling the device which held the bookshelves in place, so as to hide the metal door to the gun vault from persons within the Defendant's basement, Detective Perry called the Livingston County Jail, where the Defendant had been lodged after his arrest earlier that morning. Per Mr. Wolfe's affidavit of November 5, 1997, Detective Perry, through the jailer, told Mr. Wolfe that unless he (Wolfe) provided Perry with the combination to the gun vault door, he (Perry) would blow it open. Mr. Wolfe, even though he knew that the vault contained marijuana (03/18/98 Tr, p.68), was fearful that if the door was blown open, the ammunition inside could ignite and

place his wife and the officers in danger. As a result of those fears, Mr. Wolfe, whose request to consult with his attorney before making his decision had been rejected, agreed to provide and did provide the combination to his gun vault to Detective Perry.

There can be no serious question that Mr. Wolfe was deprived of his Sixth Amendment right to counsel on these facts. *Cf Garrity v New Jersey,* 395 US 493, 498, 87 S Ct 616, 17 L Ed 2d 562 (1967). Nor can there be any serious question that his having provided Detective Perry with the combination to the gun vault resulted, almost immediately, in the discovery of the marijuana and firearms which are the basis for the instant Indictment. Therefore, the connection between Detective Perry's conduct and the discovery of the marijuana and firearms was not so "attenuated as to dissipate the taint" of those actions. *Wong Sun v United States,* 371 US 471, 487, 83 S Ct 407, 9 L Ed 2d 441 (1963), quoting from *Nardone v United States.*, 308 US 338, 341, 84 L Ed 307, 312, 60 S Ct 266.

The Government contends that because Detective Perry "may have" in fact blown open or forced open the door to the gun vault pursuant to his authority to search Mr. Wolfe's entire premises as per the December 23, 1996 search warrant, the marijuana and firearms this case is based upon would have been "inevitably" discovered, so as to permit this Court to decline to exclude them as evidence obtained due to the Defendant's Sixth Amendment rights

having been violated. It is the Government's burden to prove, by a preponderance of the evidence, that the evidence at issue would have been acquired by lawful means had the governmental misconduct not occurred. *Nix v Williams*, 467 US 431, 444, 81 L Ed 2d 377, 104 S Ct 2501 (1984). All that they have offered to meet that burden is their argument that the search warrant authorized Detective Perry to open the gun vault, with or without Mr. Wolfe's help.

Whether the December 23, 1996 search warrant justified the entry into the Defendant's locked gun vault is an issue which has been addressed from several perspectives in this motion and in the Defendant's predecessor motion. If that search warrant was a valid basis for entry into the gun vault, then clearly, the Government's "inevitable discovery" contention is not needed. If it was not, then the Government's inevitable discovery contention fails, because the Government has offered no evidence of any other independent or police sponsored investigation upon which to base a contention that the contents of the gun vault would have inevitably been discovered, apart from having coerced the door combination from Mr. Wolfe. Clearly, a second warrant, specifically directed at the contents of the gun vault, prior to seeing what was in it, was not contemplated, and whether it would have been granted is, at this point, sheer speculation. Therefore, based upon the non-speculative facts, as they existed at the instant the door

to the safe was opened by using the illegally obtained combination to that door, the only thing which can be said to make the discovery of the firearms "inevitable" was the December 23, 1996 search warrant.

The Government has contended that Detective Perry satisfied the knock and announce statute requirements, prior to the time he broke open the bookshelves, apparently because of some very non-specific testimony that Mrs. Wolfe was shown a copy of the affidavit and search warrant sometime early in the search. If Detective Perry did not satisfy the requirements of that statute, then the evidence seized from the gun vault was illegally seized, and must be suppressed, apart from any claim of good faith. *United States v Nabors*, 901 F2d 1351, 1354 (6th Cir, 1990), *cert denied*, 111 S Ct 192, 112 L Ed 2d 154.

The Government has also contended that even if the search warrant did not authorize Detective Perry's search of the home and/or gun vault Detective Perry acted in "good faith" when he broke open the bookshelves, and (apparently) when he opened the door to the gun vault, even though Detective Perry obviously must have known, or should have known, that he had obtained the combination to that door in violation of the Defendant's Sixth Amendment right to counsel.

If this Court denies all of the Defendant's contentions as regards why the affidavit and search warrant were invalid, as written, if this Court denies the Defendant's

contention that Detective Perry's search flagrantly exceeded the scope of the warrant, and if this Court finds that the breaking of the bookshelves did not violate the knock and announce requirements, the Defendant respectfully asks that the Court address the issue of whether its prior finding that Detective Perry conducted the search of the gun vault pursuant to his "good faith" reliance upon Judge Hegarty's search warrant includes a finding that his "good faith" includes the means by which the combination to the gun vault was obtained.

Counsel respectfully contends that in the event the search warrant is found to have been an invalid basis for searching the contents of the Defendant's gun vault, any claim that Detective Perry nonetheless searched that vault in good faith, as per the *"Leon"* doctrine, must be rejected because of the added element of how Detective Perry gained access to the vault, i.e., by a knowing (bad faith) violation of the Defendant's Sixth Amendment rights.

*Leon* spoke to the situation wherein a police officer's innocent, i.e., "good faith" but erroneous reliance upon a search warrant's validity was said to render the reason for application of the exclusionary rule needless, because excluding the evidence would ut deter like situations of magistrate error versus police misconduct in the future. *Id,* p. 916. When an intentional act of police misconduct, i.e., extracting the combination to a locked gun vault in violation of a defendant's Sixth Amendment rights

has as its direct result the entry into a lacked gun vault, and the only basis for contending that the entry Was legal, the search warrant, is removed, what is left is a situation where evidence is discovered and seized as a direct result of a purposeful violation of the accused's constitutional rights. *Leon* does not and should not cover that situation.[28]

## Issue 5

**WAS THE EVIDENCE THIS CASE IS BASED UPON ILLEGALLY TURNED OVER TO THE ATF BY DETECTIVE PERRY?**

The Government's response to this issue has three (3) parts. First, they contend that as to the firearms at issue, it is untimely. That contention is apparently based upon its construction that its re-Indictment, said to have been effected to overcome a constitutional infirmity in the

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[28]This argument should not be understood to constitute an agreement that the affidavit did not contain knowing and/or reckless falsehoods upon material facts, an agreement that Judge Hegarty appropriately performed his "neutral and detached" function, or an agreement that the probable cause requirements as per *Illinois v Gates* were met by the affidavit, vis-a-vis searching the Wolfe home. *Cf, United States v Leon,* 468 US 897, 914-915, 82 L Ed 2d 677, 104 S Ct 3405 (1984).

original Indictment, really was not an inclusive re-Indictment, i.e., it did not trigger a new time period within which to file motions challenging its contents. The local court rule which provides that pretrial motions are to be filed within 20 days of the defendant's arraignment, does not say that as to re-indictments, only the new counts may be challenged. Thus, the Government's claim of untimeliness is, in truth, without any support, and represents a rather transparent first effort to avoid reaching the merits of the issues posed by the undisputed fact that the Government came into possession of the evidence its case is based upon as a direct result of Detective Perry having violated a mandatory state statute.

* * *

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

Eastern District of Michigan Filed 12/30/98

**UNITED STATES OF AMERICA,**
***Plaintiff,***

**Case No. 97-50065**

**vs.**

**Hon. Paul V. Gadola**
**U.S. District Judge**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant.***

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**ORDER GRANTING UNITED STATES' MOTION TO STRIKE**

On December 4, 1998, the government filed a motion to strike a pleading filed by defendant on November 23, 1998, entitled, "defendant's response to the government's October 23, 1998 response. In the government's October 23, 1998 submission, the United States responded to defendant's amended and supplemental motion to suppress the fruits of a state search warrant.

In the instant motion, the government accurately characterizes defendant's response as a reply brief. Pursuant to L.R. 7.1 (E.D.Mich. Sept. 8, 1998), "[i]f filed, a reply brief supporting a nondispositive motion must be

filed within 7 days after service of the response, but not less than 3 days before oral argument." L.R. 7.1(d) (2) (C). Defendant's reply brief, which defendant characterizes as a response," filed on November 23, 1998, was not timely filed within the 7-day time period, as required under Local Rule 7.1. The government's response to which the reply brief was directed had been filed on October 23, 1998, one month earlier. In addition, defendant's "response to the government's October 23, 1998 response," so-called, which is actually itself a reply brief, extends to 7 pages and is accompanied by another 49-page brief, clearly in violation of the five-page limitation set forth in Local Rule 7.1(c) (3) (B). Accordingly, this Court will grant the government's motion to strike defendant's response to the government's October 23, 1998 response.

Defendant attempts to argue that the pleading entitled, "defendant's response to the government's October 23, 1998 response" should not be considered a reply brief, or even a brief, so as to implicate Local Rule 7.1 (E.D.Mich. Sept. 8, 1998). The Court is not persuaded. Defendant's submission clearly falls within the category of a reply brief, and thus must meet with both the page and time requirements as set forth in the local rules. Having failed to timely file an ex parte motion for extension of the page limitation, or for an extension of time, defendant's submission must be stricken from the record.

**NOW, THEREFORE, IT IS HEREBY ORDERED** that the United States' motion to strike defendant's response to the government's October 23, 1998 response is GRANTED;

**IT IS FURTHER ORDERED** that defendant's response to the government's October 23, 1998 response shall be stricken from the record in the above-entitled case.

**SO ORDERED.**

Dated: 12/30/98

/s/ Paul V. Gadola
**HON. PAUL V. GADOLA**
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**UNITED STATES OF AMERICA,**
***Plaintiff,***

**vs.**

**Case No. 97-50065-1**
**Hon. Paul V. Gadola**
**Flint, Michigan**
**January 7, 1999**
**2:00 p.m.**

**RONALD NAPOLEAN WOLFE, SR.,**
***Defendant.***

Ordered By: KENNETH MCINTYRE, ESQ.

**MOTION HEARING**
**VOLUME II**

Eastern District
of Michigan
Filed 1/7/99

**APPEARANCES:**

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Court Recorder: Julie Delling

Proceedings recorded by electronic sound recordings, transcript produced by transcription service.

MR. MCINTYRE: Well, the reason that I filed my--let me describe the reasons that I filed my motion on September 30th.

I was not sure at that point whether or not the entry of the superseding indictment required my client in order to preserve all of the issues that he had raised as against the first indictment, required me to renew the original motion. I could find nothing in the local rules and basically for lack of a better term, played it safe ny renewing all of the motions and issues that I had raised in the original motion.

THE COURT: So, you're not asking that we go in at great length today to review your arguments, Mr. Haviland's arguments, and my reasoning in making my rulings on those.

MR. MCINTYRE: Not at great lengths, but I'll get to in a moment what I--what I really am after with respect to those issues. That was one reason that I filed the September 30th motion.

* * *

MR. MCINTYRE: Your Honor, the second reason that I filed my September 30th motion was because of the addition of the marijuana count. Again I was not certain whether or not all of the challenges that I had made with respect to the original indictment as regard to the

firearms would lapse, or it could be argued that I had waived them.

Therefore, I renewed all of those and included in that renewed effort an indication that I was challenging the basis for the marijuana search. I don't think based on what Mr. haviland said in his response that my fears were justified. He has apparently conceded that I didn't have to do that in order to preserve all of that. But I was again trying to play it safe.

THE COURT: If they're exactly the same counts, it would not appear that it would be--that there would be any logic to making your come in and file the same motion all over again that's been ruled upon and file briefs and have evidentiary hearings and all that sort of thing on matters that I've already precisely ruled upon.

MR. MCINTYRE: Well, that's right. And these two reasons for filing a motion I deem to be moot and I think we're all in agreement.

THE COURT: Okay. All right. Okay.

MR. MCINTYRE: But the final problem and the reason we're here today, I believe, and again the problem may be mine and no one else's. But because of this Court's ruling on September 1st, it became clear to me that this Court intended, it became obvious to me that this Court intended to permit the Government to introduce the fruits of the search of the gun vault. And that was the Court's ruling. And it was obvious that the Court intended

to take that position and it appeared to me that the Court would probably take that same position with respect to the marijuana.

That conclusion--

THE COURT: Well, didn't you ask that those items be suppressed when you were here before and I--

MR. MCINTYRE: Which--which items, sir?

THE COURT: The guns and marijuana?

MR. MCINTYRE: Yes, sir, I did. Yes.

THE COURT: And I ruled against you.

MR. MCINTYRE: Okay. And from--

THE COURT: So I guess your--your conclusion is certainly astute I must say if I've already denied your motion to suppress those items. All right.

MR. MCINTYRE: Sound, I guess. Okay. And based upon that conclusion of mine it became clear that two things were going to happen thereafter.

One would be and it's going to be--that my client is going to get convicted of one or more of those firearms charges because there really isn't much dispute that--

THE COURT: Oh, I can't presume that.

MR. MCINTYRE: Well, I'm now presuming on my own. The guns were there, the guns weren't registered, that's the case. And I think as everybody's understood from day one in this case, the real issue in this case is the search.

THE COURT: Is the search, right.

MR. MCINTYRE: Having concluded that a conviction was a probability if not an inevitability, I also concluded that based upon the obvious juxta position of the opinions in this case that an appeal was going to be filed. An appeal from this Court's--

THE COURT: It wouldn't surprise me a bit.

MR. MCINTYRE: I know. And Your Honor, I understand you've been at this and you're a pro and you're not going to be upset or offended by suggesting this.

I'm simply laying the ground work for why this motion was filed. Having concluded that an appeal was probable if not inevitable, what I wanted to do, what I attempted to do with the September 30th motion was to do my very best to make certain that all aspects of all issues that are issues in this search would be deemed by an Appellate Court to be ripe, that is deemed by the Appellate Court to have been adjudicated below and clearly ruled upon below.

And that, Your Honor, is the reason for the September 30th motion that I filed. I do not want to be faced, if I'm still in this case in Cincinnati with the contention either by the Government or any one of the Appellate Judges that look, Mr. McIntyre you didn't make that issue clear enough down in front of Judge Gadola and as a result we're not going to consider it.

I've had that happen to me. I've been at this for more years than I care to admit, but I've had that happen to me at the Appellate Courts and I definitely do not want that to happen in this case because I think as we can all agree, this case poses almost a bar exam situation for search and seizure questions.

It's got a lot of issues. And I don't want to be cut off at the pass because I didn't try hard enough to isolate those issues. Your Honor, I did not file this motion to re-plow old ground. I did not--Your Honor asked me that when we were here last and you said you weren't going to be very patient.

THE COURT: I'm gratified to hear that. Because this matter--it's a serious matter, there's serious issues involved here and there are serious charges involved here, but we spent a lot of time on this case. And--

MR. MCINTYRE: And you didn't spend as much time as we did in front of the state Judge and I understand that. That's a problem that has bedeviled this Court because we've got a lot logistics, a lot of procedures, and a lot of pages of transcripts that were created out of your presence.

* * *

MR. MCINTYRE: All right. There's another issue that I raised in one form that I had to raise

because I didn't know what the Government's position was going to be when I raised it.

They took a position that required me to refine, if you will, or change that issue. Let me explain what I'm talking about.

In my original motion I filed a motion--or as part of my motion a claim that the --the executing officers, Mr. Perry in this case, had illegally obtained from Mr. Wolfe the combination to his gun vault. I alleged in there that he had not consented to that and that therefore--

THE COURT: That came up at the prior hearings, right?

MR. MCINTYRE: Well, yeah, sort of. But the Government, I think to their credit, did not contend in response to my motion that the turnover or the obtaining of this combination was obtained as a result of consent.
So that took care of this issue in the form that I originally pled it. But--

THE COURT: It didn't come about by consent? How did they get it?

MR. MCINTYRE: Well, I read your opinion.

THE COURT: How did they get the combination?

MR. MCINTYRE: Pardon me?

THE COURT: How did they get the combination to the lock on the secret vault door in the

basement which as I recall was concealed behind a bookcase, wasn't it? The bookcase swung aside and there was this steel vault door behind the bookcase.

MR. MCINTYRE: Yes. Yes, sir. Right. With a combination--

THE COURT: With a combination lock, yeah.

MR. MCINTYRE: The way I recall the facts is that at that point Mr. Perry recognized that he couldn't get into this gun vault without knowing the combination. At that point he goes upstairs and asks Mrs. Wolfe if she could give him the combination, she couldn't.

THE COURT: She didn't have it, all right. Or she so indicated. All right, okay.

MR. MCINTYRE: Or was it--I'm not sure. At any rate at that point by that time Mr. Wolfe had been arrested, taken--

THE COURT: He wasn't even there anymore, was he?

MR. MCINTYRE: Right. He had been arrested, taken from his home, and he was lodged in the Livingston County Jail.

THE COURT: All right.

MR. MCINTYRE: Detective Perry gets on the phone, calls the jailer, tells the jailer to tell Mr. Wolfe that we need the combination or we're going to force the

door, we're going to blow it open or we're going to in some fashion force it if you don't give us the combination.

THE COURT: Yeah, okay.

MR. MCINTYRE: The evidence, and this is a part of the transcript that was not provided to Your Honor, part of the state transcript because of Your Honor's rulings, but I'll get to that in a moment.

But it is in the record. And Mr. Wolfe filed an affidavit in support of this motion. That the reason he gave up that combination while he was in jail and without having been told of his miranda rights and after he had been denied, affirmatively denied a chance to talk with his lawyer about this request, he gave it up because he was afraid that there was going to be damage to his home, gave it up knowing that there was marijuana, for example, in the vault.

THE COURT: Mr. Haviland, let me just interject. Is Mr. McIntyre correct when he says the Government does not maintain that Mr. Wolfe gave consent to the opening of the vault door?

MR. HAVILAND: I would like to correct him on one thing. We would say that Mr. Wolfe was clearly advised of his miranda rights.

He was thereafter, after he asserted his miranda rights and refused to talk, the agents nevertheless went back to him and said, look, we're going to blow your door up, do you want to give us the combination so that we can

avoid that. And that in itself, I suppose could be considered a miranda violation. But it's completely a no harm--

THE COURT: I've ruled that that--I've ruled they had a valid search warrant. And I've ruled they had a right to get into that--behind the vault door. And so really that's--it was probably a wise move on his part, he avoided a lot of damage to his property because they would have blown that door down or used a battering ram or however to get in if he had not given the combination.

MR. MCINTYRE: The--

THE COURT: Given the fact that I, as I've ruled they had a right to get into that vault.

MR. MCINTYRE: The only point I'm making, Your Honor, and I take issue, and this is just a--I think a minor factual question.

I take the issue with Mr. Haviland's contention that Mr. Wolfe was warned of his miranda rights at the time they asked him for the combination to his vault. But if--

MR. HAVILAND: Well, it clearly doesn't matter.

MR. MCINTYRE: It doesn't.

THE COURT: Why would that even matter? If he hadn't given the combination they would have--they would have, I don't know dynamited the door, or broken it down, or whatever. Whatever you need to do to get into a--into a steel vault.

MR. MCINTYRE: The only point that I'm attempting to make here, is that originally I filed this motion on the theory that it was not consensual. But because apparently that issue wasn't contested and because of this Court's ruling, that the search warrant allowed the entry into that gun vault, I want to preserve the following questions.

Let's assume--

THE COURT: Well, you've preserved the question, haven't you, as to whether or not they had a right to get into that vault. You contested that very vigorously at the hearing.

MR. MCINTYRE: I understand that. But let's assume, Your Honor, that an Appellate Court decides that getting the combination was a direct fruit or result of a violation of the defendant's 5th and 6th Amendment rights. The right--self incrimination and the right to counsel.

And let's assume that the Court decides--

THE COURT: But they would have gotten in if he had said no. That's what I'm pointing out to you. They would have gotten in there even if he had said no. If he had said no, I will not, under any circumstances ever give you the combination to that lock, then they would have said well, okay, Mr. Wolfe, I guess we're going to have to dynamite it then and--or whatever, but we're going to get in there because we've got a search warrant.

MR. MCINTYRE: What I--let me finish, if I may, Your Honor. I'm hypothesizing where an Appellate Court rules that the search warrant was not a valid basis for entering the gun vault, okay.

THE COURT: Well, that's--well, I guess you win then on whatever was found in that vault if they rule that they had no right to go into that vault. But at the present time the ruling of the Court is that they had an absolute right to go into that vault.

MR. MCINTYRE: Here's how my--here's how my suspicious or skeptical or whatever you want to call it, mind works on that issue.

The Government has contended--the Government has contended that Mr. Perry acted in good faith in executing that search warrant.

THE COURT: Yes.

MR. MCINTYRE: I can see a situation where if a Court of Appeals said Judge Gadola was wrong, that search warrant didn't authorize entry into the house or the gun vault, but because Detective Perry was acting in good faith under the Leon doctrine, the fact that the search warrant didn't justify--search warrant as written didn't justify the entry, his good faith did justify that entry.

And the issue I want to preserve is whether or not the good faith exception to the exclusion rule under the 4th Amendment also applies to a situation where the actual

executing officer, in this case, Mr. Perry, has violated that defendant's 5th and 6th Amendment rights himself.

THE COURT: All right.

MR. MCINTYRE: I don't believe that the Leon doctrine which was based upon a decision by the Supreme Court that they didn't think that it would--it would prevent officers, it wouldn't be enough when the fault of the search was the Magistrate and not the officers, therefore they're going to let in evidence under the 4th Amendment because they didn't think that keeping it out under the exclusion rule would deter the officer's action.

If you apply that reasoning to this situation I don't think a really strong argument can be made that it wouldn't deter a violation of 5th and 6th Amendment right by the same officer who is arguing a good faith basis for going into the, in this case the vault. That's the issue I'm trying to preserve.

If in fact the Appellate Court, Your Honor, agrees with you that the search warrant was a valid basis for entering the gun vault thereby not rendering the need for the good faith issue to come forward, then we've got a pure question of whether or not a violation of a 5th and 6th Amendment right in effect trumps a valid search when the search netted something that came as a direct result of the 5th and 6th Amendment right.

You didn't rule on that issue, Your Honor, and I again, just to avoid any argument that I didn't raise it

below, that's what's going on here. I am now asking this Court to make that decision.

THE COURT: All right.

MR. MCINTYRE: The other three issues.

THE COURT: The other three issues.

MR. MCINTYRE: Remember I said there were four other issues, that's the first one. And that's kind of the one that stand by itself. One is raised originally, but in a different form.

The other three issues that I'm asking for clarification--

MR. HAVILAND: Excuse me, but before he goes on, and I apologize, Mr. McIntyre, but I really don't understand the relief he's asking the Court and before we move on to the next point, would you mind just stating exactly what you want the Court to do in regard to that issue?

MR. MCINTYRE: Well, I've already promised the Court that I'm not asking it to plow old ground. So I'm not going to ask the Court to reverse its decision that the search warrant was a valid reason for entering the gun vault.

THE COURT: Yes.

MR. MCINTYRE: But what I am asking this Court to address, if it cares to, and I don't have authority to direct you do anything, and I'm obviously not directing you to do anything. But what I'm asking the

Court to consider is what happens if an Appellate Court reverses your decision that the search warrant was a valid basis for going into the vault.

I am then asking you to address the question of whether or not your finding of good faith, a good faith reliance upon the search warrant nevertheless justifies the seizure and the use as evidence of the fruits of that search of the gun vault. That's what I'm asking.

And I'm also asking you to--

THE COURT: Well, why should I have to rule on that? I've ruled already that the search is valid.

MR. MCINTYRE: You don't have to. I mean I'm not here to tell you, you absolutely have to, I'm just saying I don't want to get stuck--

THE COURT: I think I'll stand by that really.

MR. MCINTYRE: Okay. I am also asking--

THE COURT: If the Court of Appeals tells me I'm wrong, I guess they--that's their prerogative. That's what they're paid to do.

MR. MCINTYRE: And all I'm doing is making sure that they don't have a reason or excuse or for lack of a better word, some justification for saying to me you didn't raise it below.

The other relief that I am asking you to consider is a ruling upon whether or not a violation of the 5th and 6th Amendment right to counsel and to be warned of the

consequences of giving up that combination requires the suppression of the fruits regardless of whether or not the 4th Amendment issue is resolved against my client. That's for lack of a better word, that's simply two constitutional rights butting up against a third.

Does the 5th and 6th constitutional violation trump or overcome what you found to be a valid exercise of the officer's right to search under the 4th, that's the issue.

***

MR. MCINTYRE: Okay. Here are the three issues that I'm asking for clarification on. Excuse me. Did the search warrant and affidavit, December 23rd search warrant and the 19th affidavit describe the property that the officers executing the search warrant were to seize of they found with sufficient particularity to meet the particularity requirements of the 45th Amendment. That's the first issue.

THE COURT: You never mentioned that during the first hearing?

MR. MCINTYRE: Yes, sir, I did. I did.

THE COURT: Well, when I ruled that the search warrant was valid, I've covered that then haven't I?

MR. MCINTYRE: Well, that's--that's--that's my problem and--

THE COURT: The search warrant was valid and the search was valid I ruled. Doesn't that pretty much dispose of that?

MR. MCINTYRE: Well, let me--if I may, I'll jump right to that one then, Your Honor. As I--and again this issue that I'm asking for clarification upon requires this Court to do nothing more than read Paragraph 1 of the search warrant wherein what property is to be searched for and seized if found is listed.

And that's about eight lines as I recall and there's 11 different types of property that these officers were directed to search for and seize if they found. Every one of those 11 different types of property was described in a very generic, very general fashion.

Records of ownership, shingle sample, bales of hay, golf carts, nothing in that description of property to be searched for and seized provided the executing officers with any method of distinguishing between golf carts, bales of hay, shingle samples, that were in some fashion connected to some crime described in the affidavit. So the bottom line of what those officers had in hand when they went out to execute that search warrant is, they were told you are to seize, pick one of the 11.

Shingle samples, let's take that one, or photographs. They weren't told which photographs, they weren't told what the photographs would depict. They weren't told how they were to distinguish between photographs of perfectly

innocent objects from photographs which would result in or constitute evidence of a crime.

In short that way the wording of that first paragraph of the search warrant was in its final form provided to the executing officers is that they would go out and look for photographs or again, pick a number. And they, the officers, were to decide which photographs they were going to take and ones they weren't going to take.

They were to decide which bales of hay they were going to take and which ones they weren't. They were to decide which records of car registration they were going to take and which ones they weren't.

And nowhere in either the affidavit or the search warrant were they given any pre-search indication as to how to distinguish between the good stuff and the bad stuff. And that, Your Honor, is the particularity with respect to the property to be searched for and seized. That's the issue I want clarified insofar as this Court's finding.

That that language met the requirements of the Coolidge case, of the Marron case, and the other cases that I cited in my original brief and also cited in that brief that Your Honor has deemed to be too late. That's the issue.

What Your Honor held as I read your opinion, is simply that there was enough probable cause to allow the District Judge, in this case Judge Hegarty to enter an order allowing the officers to seek--I'm sorry, to search the whole

property and to look for items of theft or items of criminality.

Now if that ruling, Your Honor, if the ruling--it's at Pages 21 through 28 of your opinion. If that ruling was intended by this Court to constitute a ruling that the language of Paragraph 1, the property to be searched for, was sufficiently particular enough to allow the officers to go out and distinguish that which they shouldn't take, fine, I'm satisfied.

But I don't again want the Appellate Court to say to me hey, Red, why didn't you raise that down below. You cited cases that talked about the reason for the 4th Amendment, the requirements of particularity. The particularity requirements being in there for the framers of the 4th Amendment to avoid overly broad and overly general searches.

But you didn't make your position clear enough as to what you were talking about in terms of the particularity issue as to the property to be searched. That's what I'm trying to do here today. That's issue number one.

And again as I said, Your Honor, really all it requires you to do is read that first paragraph and decide whether or not if you, for example, were one of the executing officers, you would know which photographs, which bales of hay, which anything in that paragraph you were supposed to take versus the ones you weren't supposed to take.

And it is my contention that there is no distinction, no pre-search guidelines which would allow the officers to decide which ones should be taken and this issue of course dovetails with the third issue that I'll get to in a moment and that is if this search was just over broad. The officers went out there and had no intention of paying any attention to any restrictions set forth within the affidavit or in fact within the search warrant itself. Opposite sides of the same coin.

Your Honor, the second issue that I'm asking for a clarification on is really the same issue, the particularity issue but this time I'm focusing upon the requirement that the place to be searched must be described with particularity. Again the same rationale applies as I understand these old chestnut Supreme Court cases.

The framers of the 4th Amendment were reacting to British agents going out and searching anywhere--anywhere they bloody well pleased for anything they wanted to look for, no restrictions on where they searched or what they searched for.

And as I understand it and I attempted to raise it and I did raise it, and Mr. Haviland agrees that I raised it but he said Your Honor ruled on it and if you did, fine again. But the search warrant in this case said go on out and search the entire premises, 50 acres, four buildings, a house, and three out buildings and you can look for any one of these 11 types of property anywhere on the premises.

And my contention very simply is that that broad of a directive as to where to search violates the particularity requirements of the 4th Amendment with respect to the second paragraph that is where to be searched. I don't think I need argue that one anymore.

I think if the Appellate Court that I'm afraid of accepts the idea that I have raised the particularity question with respect to Paragraph 1, they'll also do the same with respect to Paragraph 2. I simply want to suggest, Your Honor, that I don't think it's appropriate for the officers to take to a Magistrate a description of a series of crimes as was done here, describe the fruits of those crimes as being hay or building materials or something that can be confined to a definitive area, and ask for permission to search the entire premises.

And as the proofs offered both in this Court, I think--no, it wasn't in this Court, this Court stopped me. But in Judge Burress' Court the proofs suggested that Mr. Perry concluded that this directive to search the entire premises allowed him to look for any of the 11 types of property anywhere on the premises and the only restriction on where he could search was if there was a compartment small enough that it wouldn't hold a single receipt. That was the one limitation on where he could search and he conceded that he saw no such compartments that were that small.

In short he read the second paragraph of the search warrant as a blanket authorization to search anywhere and

everywhere on the entire premises. And I respectfully suggest that that violates the particularity requirements of the 4th Amendment.

The final issue, Your Honor, thankfully, the final issue as I mentioned a moment ago, was the issue of whether or nor this search as executed, not as authorized by the first or second paragraphs of the search warrant, but as executed, as the officers swarmed about Mr. Wolfe's premises on the 23rd was so general, so overly broad, so totally in derogation of any restrictions, it could arguably be said to have been imposed upon him by the facts in the affidavit that it, the search, was for that reason alone, unreasonable and under existing case law all of the fruits of the search must be suppressed.

This is the troublesome one, Your Honor. This is the one that in essence prompted the long, the bulk of the long motion or the long response that you have stricken as untimely. What happened here was that I pled it, I pled a general search, Paragraph 19 I think it is of my original March 10 motion.

I said this was a prototype of something, example of the general search that the 4th Amendment was deigned to prohibit. During the hearing of this matter in front of you, Your Honor, on the 31st of December, I attempted to question Mr. Perry about this very issue. And Mr. Haviland objected and Your Honor sustained the objection saying as I recall it, that while the search may have been too broad--

may have been I think were your words in some areas you were concerned about whether or not they could legitimately search the gun vault.

And you sustained Mr. Haviland's objection thereby cutting off my effort and my opportunity to offer proofs upon the question of whether or not the search as executed was too general. That ruling resulted in the following.

I wasn't allowed to question Mr. Perry about the general nature of the search. It made no sense for me to call the other officers who participated in the search to elicit from then what they had been told about the scope of the search, whether they had even read the search warrant or the affidavit, and what the ground rules were for seizing things on that day, all of which I deemed to have been completely irrelevant to the question of whether or not the search as executed was too general.

It also resulted in me not tendering to Your Honor all of the transcripts of testimony taken upon that issue in front of Judge Burress. I did supplement the submission of transcripts to you with my November submission so as to cover that problem in case Your Honor would not allow us to brings on further evidence on this general search question. Which as I understand it is what the Court's decision was, that we were not to be permitted to do so.

So what I'm fearful of and what I am attempting now to put to rest is the contention made by Mr. Haviland in his October 23rd response which was as follows.

McIntyre, you didn't raise this general search issue, I deny that.

Paragraph, as I said I think it's Paragraph 19 of the original motion, we did raise it. And Mr. Haviland's follow up argument was even if you did, you didn't offer any proof and therefore this Court shouldn't be bothered with rendering a decision on that.

That struck me and strikes me as being unfair. The Court ruled I couldn't offer any proof, yet Mr. Haviland is arguing that because I didn't offer any proof this Court shouldn't consider the general search question.

That's why I asked on September 30th for this Court to clarify whether it intended to make ruling on this issue and if it did, fine, I'd be satisfied with that. But if it did not, I ask for permission to recall Detective Perry and recall the other officers who participated in the execution of the search and to summarize the testimony these officers gave in front of Judge Burress on this issue.

That summary is what constituted, I believe, it's from page 16 to 41 of the November submission, Your Honor, that you ruled was not timely because it was a reply brief. I apologize. I did not deem that to have been a reply brief other than it was an effort by me to buttress the factual record that I had been deprived of the opportunity to make in July.

And I therefore am respectfully asking Your Honor to reconsider this decision not to consider that--at least that

portion of that submission so that Your Honor will have the benefit if that's the right word, of the facts as I've gleaned them from the prior testimony on this issue of general search.

Let me conclude with this, Your Honor. I understand this case has posed a procedural and logistical problem. i understand that it has a lot of issues. And as Your Honor has indicated and I think we can all agree it's a case that's fraught with lots of search and seizure questions.

All I am attempting to do with this motion, and all I am attempting to convince Your Honor to do as a result of this motion, is to look at the issues that I've raised and to rule upon them if Your Honor believes that its original opinion did not specifically enough ruled upon them, simply say so. That's what I'm asking and I appreciate the Court's time. Thank you.

THE COURT: Thank you, Mr. Haviland.

* * *

**Case №. 99-1696**
**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**UNITED STATES OF AMERICA,**
***Plaintiff-Appellee,***

**vs.**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant-Appellant.***


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**BRIEF OF APPELLANT**

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* * *

***Issue #2 The "Particularity" Issue.***

As they were described in the search warrant, each of the 11 types of property to be search for could be lawfully possessed by Mr. Wolfe. The search warrant gave the executing officers no pre-search guidance how to distinguish between legally owned property, records, documents, photographs, etc. and evidence of crimes. Such pre-search directions could easily have been provided, i.e., the warrant could have described the unique loop said to be associated with the stolen hay, and which building materials, records, photographs, etc. should be seized and which should not. As described in Issue #3, the officers who conducted the search made no effort to draw any distinctions between lawfully owned property and what they personally decided might be evidence of crimes.

Judge Gadola did not specifically address the "particularity" issue in his September 1, 1998 Opinion and Order. Nevertheless, he ruled that his September 1, 1998 decision had adequately addressed and resolved that issue. (R. 44, Gadola Opinion 01/13/99, pp.5-7, Apx. _ to _)

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* * *

**(C) Argument.**

The specter of police officers engaged in the "...often competitive enterprise of ferreting out crime..."[9] being permitted to decide, as a search unfolds, which of the generically described property in a search warrant he/she will search for and seize has yielded a black letter rule of law concerning the "particularity" requirements of search warrants, i.e.:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States,* 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed. 231 (1927). *See also, Roaden v. Kentucky,* 413 U.S. 496, 502, 93 S.Ct. 2796, 37 L.Ed. 2d 757 (1973), *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 325-326, 99 S.Ct. 2319, 60 L.Ed. 2d 920 (1979); *United States v. Gardener,* 537 F.2d 861, 862 (6th Cir., 1975)

When, as occurred, in this case, the affidavit and search warrant failed to provide the officers with **any** pre-

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[9] *Johnson v. United States,* 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1947).

search guidance as to which generically described items of property were to be seized, the warrant is inadequate. This is particularly true when, as here, there was information available to the drafter of the affidavit and search warrant which allowed him/her to be more precise, i.e., more particular. *United States v. Klein,* 565 F.2d 183, 189-190 (1st Cir., 1977); *Montilla Records of Puerto Rico, Inc. v. Morales,* 575 F.2d 324, 326-327 (1st Cir., 1978); *United States v. Cook,* 657 F.2d 730, 733-735 (1981). *See also, United States v. Fuccillo,* 808 F.2d 173 (1st Cir., 1987).

* * *

Finally, even if this Court finds that both prongs of the plain view exception to the warrant requirement were met below, that exception is simply not available to the Government to save the warrantless seizure of any evidence from the gun vault. Perry admitted that he could have secured the contents of the vault while a second search warrant was being procured. He knew that to do so posed no risk to himself or to any other officer at the scene, nor did it pose any risk of loss or destruction of evidence. The "practical justification" for allowing police officers to seize objects in plain view:

> "... is the desirability of sparing police, whose viewing of the object in the course of a lawful

> search ... the inconvenience and the risk -- to themselves or to the preservation of evidence -- of going to obtain a warrant."
> *Arizona v. Hicks, supra.*, p. 327

Absent those risks, there was no justification for dispensing with the need to attempt to obtain a search warrant to seize the contents of the gun vault. Warrantless searches are **presumed** to be unreasonable, unless they can be justified by one of the exceptions or exigencies which make such searches imperative. *McDonald v. United States,* 335 U.S. 451, 455-456, 69 S.Ct. 191, 93 L.Ed. 153 (1948); *Chimel v. California,* 395 U.S. 752, 762-763, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (1969); and *Payton v. New York,* 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980).

**D. Conclusion.**

Neither of the underlying requirements necessary to apply the plain view exception to the warrant requirement was established below. Even if they had been, the fact that a second search warrant allowing the police to seize the contents of the gun vault they could establish represented evidence of a crime[13] could have been sought without

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[13]Based upon his description of what he knew and did not know, what could Detective Perry have said, in a second affidavit, to establish that the firearms in the vault

placing the officers or the integrity of the evidence at risk, defeats the Government's reliance upon that doctrine to validate the warrantless seizure of the contents of the vault. Those contents should therefore be suppressed as the fruits of an unreasonable search and seizure under the 4th Amendment.

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were evidence of a crime?

**Case No. 99-1696**
**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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**UNITED STATES OF AMERICA,**
***Plaintiff-Appellee,***

**vs.**

**RONALD NAPOLEON WOLFE, SR.,**
***Defendant-Appellant.***

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6th Circuit
Court of Appeals
Filed 11/15/99
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# APPELLANT'S REPLY BRIEF

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* * *

Finally, the Government's claim that the language of the search warrant described the item of property with sufficient particularity because of a "flexible" requirement for such specificity is invalid. The affidavit could have described each of the items of stolen property with far more specificity than was used, i.e., specific bales of hay with a unique loop were said to have been stolen, specific building and roofing materials, by dimension and/or color were known to the officers. So too, records involving these items could have been described by reference to the specific items of allegedly stolen property. Appellant asks this Court to reject the Government's obvious effort to save the (generally) search which was conducted pursuant to a wholly non-particularized description of property to be searched for by offering up a general "flexibility" principle, and then failing to address the specific factors of this case which touch upon that principle.

* * *

The Government offered no response or rebuttal to Appellant's contention that because the proofs below affirmatively established that Detective Perry knew that a second search warrant could have been sought in order to try to obtain a neutral magistrate's permission to seize the

contents of the gun vault pursuant to a search warrant, and to do so posed no risk of loss of evidence or danger to him, the government simply cannot rely upon the plain view doctrine at all. The only statement set forth in the Government's Brief which would arguably be said to address this issue is it bare, unsupported assertion that:

> "There is no requirement for the government to prove that exigent circumstances made application for a new search warrant inapplicable." (Government's Brief, p.31)

Appellant does not agree with that legal assertion, but the facts of this case make it irrelevant. Detective Perry testified that the contents of the gun vault would not have been disturbed, nor would he or any officer be placed in danger, had a second search warrant been sought. When that factual situation is presented, the clear language and principle enunciated in *Arizona v. Hicks*, 480 U.S. 321, 327, 107 S.Ct. 1149, 94 L.Ed. 2d 347 (1987) and *Coolidge v. New Hampshire*, 403 U.S. 443, 455 and 468, 29 L.Ed. 2d 564, 91 S.Ct 2022 (1971) controls, i.e, the underlying exigency or practical justification for allowing police officers to seize objects without a warrant pursuant to the plain view doctrine, simply cannot be met. Seizures under those circumstances, i.e., the very circumstances presented in this case, become warrantless seizures which are

presumed to be invalid in the absence of one of the exceptions to the need for a search warrant.

**(C) Conclusion.**

Even if this Court concludes that the affidavit met constitutional muster upon the *Gates* requirements of probable cause, that the search warrant met constitutional muster upon the "particularly" requirements of the Fourth Amendment, and the status of the record below allowed Judge Gadola to avoid having to make findings of fact or to draw conclusions of law upon the general search issue, the instant search and seizure still fails to meet constitutional muster because the specific facts of this case, as described by the seizing officers:

(1) fail to establish the "immediately apparent" element of a plan view seizure; and

(2) the uncontroverted facts of this case remove the practical justification, i.e., the only exigency the Government relies upon validate a plain view seizure, i.e., the impracticability of obtaining a search warrant.

For these reasons, the plain view based seizure of the contents of the gun vault violated the Fourth Amendment and requires the suppression of those contents as evidence in this case.

**Case №. 99-1696**
**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**UNITED STATES OF AMERICA,**
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**DEFENDANT-APPELLANT'S SUGGESTION FOR REHEARING *EN BANC*, AS PER RULE 35 OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND RULE 14(a) OF THE RULES OF THIS COURT**

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**Dated: November 21, 2000**

* * *

(5) *Coolidge v. New Hampshire, supra.*, pp. 468 and 478; *Chimel v. California, supra.*, p. 763; *Chambers v. Maloney,* 399 13.5. 42, 151 (n. 9), 90 S.Ct. 1915, 26 L.Ed.2d 419 (1970); *Vale v. Louisiana,* 399 U.S. 30, 34-35, 29 L.Ed.2d 409, 90 S.Ct. 1969 (1970); *Texas v. Brown,* 460 U.S. 730, 739, 163 S. Ct. 1535, 75 L.Ed.2d 502 (1983); and *Arizona v. Hicks,* 480 U.S. 321, 327, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). (The practical justification for allowing police officers to seize evidence they come across in plain view or while executing an arrest, is the desirability of sparing the police the inconvenience and the risk-to themselves or to the preservation of evidence which would occur if they had to seek a search warrant before seizing the evidence.)

* * *

***(B) Particularity.***

The search warrant directed the executing police officers to search for and seize 11 different types of property, records, etc. (Apx. 0056) The warrant's description of the 11 types of property did not direct the officers to search for or seize any specific piece of property said in

the affidavit to have been associated with any of the six (6) crimes described therein. Instead, all 11 types of property to be seized were described in general, generic language, which provided the seizing officers with no pre-search help in distinguishing which 11 types of property they were to seize, and which they were not to seize.

Prior to the preparation of the affidavit and search warrant, Detective Perry and Mr. Garber had been told: (a) the *"stolen"* hay was bound with a unique twine loop (Apx. 0057), yet the search warrant authorized the seizure of *"bales of hay,"* without any limitations; (b) the dates of alleged thefts OSB board, and the number, size and length of the other *"stolen"* building materials (Apx. 0058), yet the search warrant authorized the seizure of *"building material samples"* and *"records relating to building materials for (all)* the structures on the premises" without any limitations as to date of acquisition, type, size, or length of such materials; c) the color (brown) of stolen roofing materials (Apx. 0058), yet the search warrant authorized the seizure of *"shingle samples"* without any limitations; (d) a single photograph of a golf cart located on Mr. Wolfe's premises existed (Apx. 0060), yet the search warrant authorized the seizure of *"photographs"* without any limitations; and e) a *"stolen"* golf cart bearing a specific serial number had been taken to Mr. Wolfe's property in January, 1995 (Apx. 0059-0060), yet the search warrant

authorized the seizure of *"golf carts"* without any limitation or description of that serial number.

The affidavit also failed to allege that any specific firearm or vehicle had been used to commit any criminal act described therein, yet no limitation as to which firearm records or vehicle registration records were to be searched for was set forth in the search warrant.

Although Appellant raised the lack of particularity issue in his March 10, 1998 brief (Apx. 0101-0104), Judge Gadola made no findings upon this issue in his September 1, 1998 opinion. Appellant's September 30, 1998 motion re-raised the lack of particularity issue (Apx. 0325-0330; see also Apx. 0380-0381 and 0386 to 0396). Counsel to Appellant, on January 7, 1999, pleaded with Judge Gadola to make specific findings upon this issue. (Apx. 0725-0726 and 0737A-0737E), but in his January 13, 1999 Opinion, Judge Gadola refused to do so. He acknowledged it had been raised (Apx. 0460), but held that in light of his September 1, 1998 rulings (probable cause and plain view), Appellant *"will not be permitted to relitigate issues* regarding the *validity of the search warrant and its execution."* (Apx. 0462) (emphasis added)

Although the history of the particularity (and general search) issues were set forth in Appellant's November 15, 1999 Reply Brief (pp. 6-14), this Court held that Appellant had *". . . not articulated in what way the warrant failed to*

*particularly describe the items to be searched for and seized"* (p. 12).

* * *

***(D) Plain view.***

Appellant's contention that the plain view doctrine was not available to the Government **at all** because the contents of the vault could have been secured without any risk to the officers or to the integrity of the evidence while a second warrant was sought (Appellant's Brief, pp. 37-38), was neither addressed nor resolved by this Court.

* * *

Appellant's description of the facts supporting his general search claim consists of 26 annotated pages of the Joint Appendix (Apx. 0400-0425), plus a multi-page description of how Detective Perry knowingly used the December 23, 1996 search warrant to justify his pre-search agenda with Agent Evans to look in the gun vault for firearms he knew the warrant did not allow him to search for or seize. That was and is a classic example of a search beyond the scope of a warrant, i.e., a general, exploratory search.

This Court's decision upon the plain view issue deserves special attention, because it is in direct conflict

with existing Supreme Court and Sixth Circuit case law. Detective Perry unambiguously testified that seeking a second search warrant to seize the contents of the gun vault would not have posed any risk to him or the other armed officers present in the Wolfe home, nor would it have posed any risk that the property within the vault would be lost or in any way disturbed. The "practical justifications" for allowing officers to seize evidence they discover while legally upon non-public property without a search warrant are, as per Plain View (5) above, to avoid the risks to the officer who sees the property, and to avoid the risk of losing the evidence. Absent both of those justifications for permitting a warrantless seizure of the contents of the vault, the rule that all seizures without a warrant are per se unreasonable unless one of the carefully delineated exigencies is shown to exist is applicable here.[3]

* * *

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[3]Perry's testimony upon this issue was before Judge Gadola, as was Appellant's challenge to the Government's plain view defense. This particular aspect of the plain view issue was raised in Appellant's original brief with this Court. As noted above, this Court has authority to consider it as it did the Government's similarly situated probable cause for each building contention.

### *(5) Conclusion - Relief Requested.*

Counsel to Appellant respectfully asks this Court to remand the particularity and general search issues back to Judge Gadola and direct that he make specific findings and conclusions upon those issues. If that does not resolve this case, or if this Court does not choose to do so, Appellant asks this Court to hold that the December 23, 1996 affidavit failed the *Illinois v. Gates* probable cause requirements, that the warrant failed the Fourth Amendment's *"particularity requirements"* that the search, as conducted, including the search of the gun vault, was a general, exploratory search, outside the scope of the warrant, and finally, that the Government failed to meet its burden of establishing the plain view exigency to the warrant requirement.

* * *